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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 987

ALABAMA-TENNESSEE NATURAL GAS COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION, CITY OF CORINTH, MISSISSIPPI, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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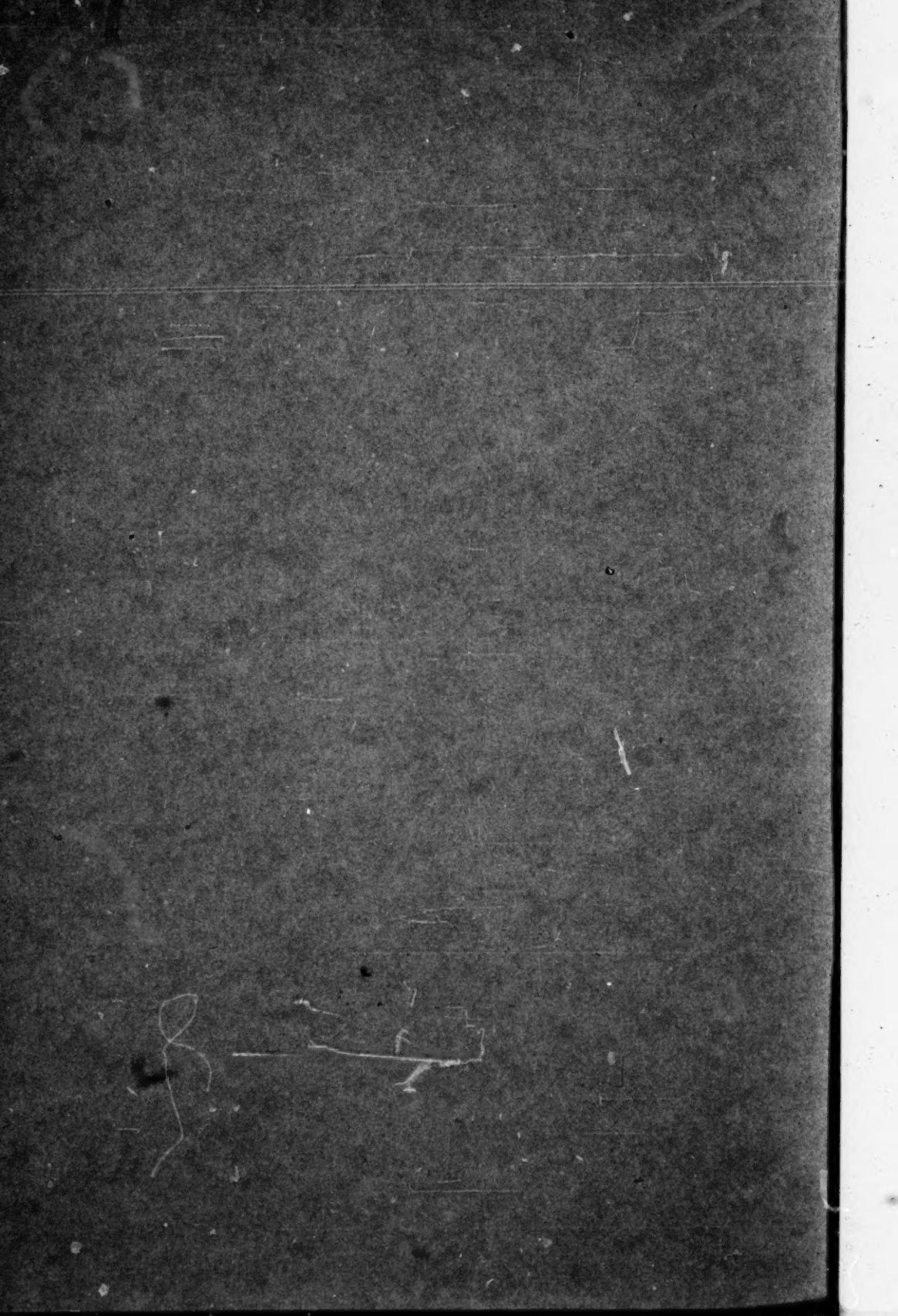

INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
I. History of Alabama-Tennessee's Service to Corinth	3
II. The Administrative Proceedings Below	5
III. The Decision of the Court of Appeals	8
REASONS FOR GRANTING THE WRIT	11
I. The Decision of the Court Below Is in Conflict With Decisions of the United States Supreme Court Which Delineate the Limits of the Commission's Power to Modify and Revoke Certificates of Public Convenience and Necessity	11
II. The Decision of the Court Below Is in Conflict With the Holding of Another Circuit and This Court With Respect to the Applicability of Section 7(b) of the Act	12
III. There Are Important Statutory Issues Involved	14
CONCLUSION	17
APPENDICES:	
APPENDIX A (Petition for Review of Orders of the Federal Power Commission [Alabama Case])	1a
APPENDIX B (Petition for Review of Orders of the Federal Power Commission [Alabama Case])	11a
APPENDIX C (On Petition for Rehearing and Petition for Rehearing En Banc)	12a
APPENDIX D (Excerpts From the Natural Gas Act)	13a

TABLE OF CASES

CASES: Page

American Trucking Associations, Inc. v. Frisco Transportation Company, 358 U.S. 133 (1961) 11
Atlantic Seaboard Corporation v. F.P.C., 397 F.2d 753 (4th Cir. 1968) 17
Cincinnati Gas & Electric Company v. F.P.C., 389 F.2d 272 (6th Cir. 1968) cert. den., 393 U.S. 826 17
City of Pittsburgh v. F.P.C., 237 F.2d 741, (D.C. Cir. 1956) 13, 14
Civil Aeronautics Board v. Delta Air Lines, Inc., 367 U.S. 316 (1961) 11
Home Gas Company v. F.P.C., 231 F.2d 253 (D.C. Cir. 1956) cert. den., 352 U.S. 831 17
Kentucky Natural Gas Corp. v. F.P.C., 159 F.2d 215 (6th Cir. 1947) 17
Michigan Consolidated Gas Company v. F.P.C., 283 F.2d 204 (D.C. Cir. 1960) cert. den., 364 U.S. 913 ..... 10, 13, 14
Panhandle Eastern Pipe Line Company v. F.P.C., 169 F.2d 881 (D.C. Cir. 1948) cert. den., 335 U.S. 854 .. 17
Scenic Hudson Preservation Conference v. F.P.C., 354 F.2d 608 (2nd Cir. 1965) cert. den., 384 U.S. 941 .. 14
Sun Oil Company v. F.P.C., 364 U.S. 170 (1960) 12
United Gas Pipe Line Co. v. F.P.C., 385 U.S. 83 (1966) 10, 12, 13
United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964) 15
United States v. Seatrain Lines, Inc., 329 U.S. 424 (1947) 9, 11, 14, 16

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Alabama-Tennessee Natural Gas Company (Alabama-Tennessee), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on August 4, 1969.

OPINIONS BELOW

The opinion of the Court of Appeals, reprinted in Appendix A hereto, *infra,* pp. 1a-10a, is reported at —— F.2d ——. Opinion No. 534 of the Respondent Federal Power Commission ("Commission") (J.A. 103-131) is reported at 38 FPC 1069. An order of the Commission denying rehearing, stay and reopening of the record (J.A. 132-136) is reported at 39 FPC 97.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 4, 1969 (Appendix B. p. 11a). A timely petition for rehearing *en banc* was denied on September 24, 1969 (Appendix C.) and this petition for certiorari is being filed within 90 days of that date. This Court's jurisdiction is invoked under Section 19(b) of the Natural Gas Act ("The Act") [15 U.S.C. § 717r(b)] and 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Power Commission may modify and revoke the numerous certificates of public convenience and necessity issued Alabama-Tennessee under Section 7(e) of the Act [15 U.S.C. § 717f(e)] and relied upon by that company in constructing authorized facilities over a period of years, by terminating the long-established service rendered by Alabama-Tennessee to the City of Corinth, Mississippi (Corinth) and replacing it by service from another natural gas company.

2. Whether Section 7(b) of the Natural Gas Act, [15 U.S.C. § 717f(b)] providing for abandonment of certificated service applies to cases, such as this case, where a natural gas company is ordered by the Commission to terminate certificated service to a customer.

3. If the Commission is required to apply the standards of Section 7(b) in this case, should the Commission consider only the impact upon the party to which service is being terminated or should it also consider (a) the detriment to all those affected, including the natural gas pipeline company, the investing public which has relied upon the company's certificates and the company's remaining customers in other states, and (b) reasonable alternatives to the termination of service.

4. Whether the Commission may, pursuant to Section 7(a) of the Natural Gas Act [15 U.S.C. § 717f(a)], direct service of natural gas by a new supplier through new facilities which duplicate and render useless existing facilities of a presently certificated supplier already serving the market.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are Sections 4(b), 7(a), 7(b), 7(c), 7(e) and 7(g) of the Natural Gas Act [15 U.S.C. §§ 717c(b), f(a), f(b), f(c), f(e) and f(g)]. They are printed in Appendix D hereto.

STATEMENT OF THE CASE

I. History of Alabama-Tennessee's Service to Corinth.

Alabama-Tennessee is a natural gas company authorized by the Commission to transport and sell natural gas in interstate commerce pursuant to permanent certificates of public convenience and necessity granted under Section 7(e) of the Act. Its pipeline system is located in three states and serves a region extending approximately 140 miles from a point near Selmer, Tennessee, easterly to Huntsville, Alabama.

The company is one of the smallest pipeline companies subject to the Commission's jurisdiction. It serves 16 customers who buy natural gas in interstate commerce for resale, the rates for which are regulated by the Commission. These customers include the municipally-owned distribution system of the City of Corinth, Mississippi. Alabama-Tennessee also serves six direct industrial customers.

Alabama-Tennessee was initially authorized to construct and operate interstate pipeline facilities by a certificate of public convenience and necessity granted by the Commission on July 2, 1948 (7 FPC 251, 257). This authorization was based on the Commission's authorization for Alabama-Tennessee to purchase all of its natural gas requirements from Tennessee Gas Transmission Company, predecessor in interest to Tennessee Gas Pipeline Company, a division of Tenneco, Inc. ("TGP").

Alabama-Tennessee's initial authorization included service to Corinth. Although Corinth had previously approved a municipal bond issue to build a 22-mile pipeline and buy gas directly from TGP (J.A. 3) the city decided, in view of the economies involved, to become a customer of Alabama-Tennessee (7 FPC at 255). At Corinth's request, Alabama-Tennessee rerouted its original 10-inch main line, increasing its overall length by about ten miles so as to pass within 2½ miles of Corinth and built a 2½ mile lateral line to Corinth's city limits.

After the initial construction of the Alabama-Tennesse system, Alabama-Tennessee served the growing demands of all of its customers, including Corinth's, by expanding its system practically every year. In

each instance, the Commission found these expansions were required by the public convenience and necessity and issued certificates authorizing the projects. Alabama-Tennessee expanded its system in reliance upon such certificates.

The Commsision's authorizations of Alabama-Tennessee's expansion were explicitly conditioned upon Alabama-Tennessee's service of Corinth's requirements (e.g., 12 FPC 1449, 1451; 33 FPC 1, 3), which grew from 1,550 Mcf per day in 1953 to 4,500 Mcf per day in 1965, and upon TGP's providing the necessary gas supply through the pipelines of Alabama-Tennessee rather than directly. It is not disputed that Alabama-Tennessee has been diligent in satisfying the increasing demands of Corinth and that service to Corinth has been approved repeatedly by the Commission over a period of years up to and including the Commission's authorization in 1965 (33 FPC 1).

II. The Administrative Proceedings Below.

The proceedings below were initiated on April 25, 1966 by Alabama-Tennessee's application designated Docket No. CP66-336 for a certificate of public convenience and necessity authorizing it to construct and operate 2½ miles of 3½ inch lateral pipeline to parallel its existing lateral to Corinth. This new lateral, estimated to cost $42,900 was required in order to provide Alabama-Tennessee with the capacity to satisfy Corinth's increased requirements for natural gas. These requirements, based upon Corinth's estimates, were expected to reach 6,850 Mcf per day by 1972 (J.A. 76).

Since it executed the 1956 service agreement for a maximum daily quantity of 3,850 Mcf, Corinth has refused to execute new service agreements for the daily

quantities in excess of 3,850 Mcf which it has actually taken from Alabama-Tennessee, since the winter of 1959-1960 (J.A. 6, 10). During the 1965-1966 heating season, Corinth took as much as 5,242 Mcf on a single day (J.A. 21).

To remedy this situation, Alabama-Tennessee requested in the administrative proceeding below that the certificate to be issued be conditioned to require Corinth to enter into a service agreement, in the form contained in Alabama-Tennessee's FPC Gas Tariff on file with the Commission, providing for Corinth's present contract requirement of 3,850 Mcf per day for the period ending February 1, 1970, and for its additional requirements for the period ending November 1, 1985. This type of arrangement had been entered into with other resale customers with the approval of the Commission.

Five months after the filing of Alabama-Tennessee's certificate application, Corinth filed its application under Section 7(a) of the Act (FPC Docket No. CP67-62). Therein, Corinth requested the Commission to enter an order directing TGP to provide its requirements in excess of 3,850 Mcf per day until February 1, 1970, the expiration date of its existing service agreement with Alabama-Tennessee. Thereafter, it proposed to discontinue all of its purchases from Alabama-Tennessee and asked that TGP be directed to deliver to it all of its natural gas requirements. In order to take deliveries directly from TGP, Corinth proposed to construct 3 miles of 8-inch pipeline to a point on TGP's Kinder-Portland line at an estimated cost of $100,000. This would also require TGP to build a metering and regulating station at a cost of $26,275.

The applications of Alabama-Tennessee and Corinth were consolidated by notice of the Commission's Secretary dated October 26, 1966 and the dockets were jointly heard. The Presiding Examiner issued an initial decision on April 28, 1967 (J.A. 77-102) and, after the filing of briefs on exceptions and briefs opposing exceptions, the Commission on November 30, 1967, issued its Opinion No. 534 (J.A. 103-131).

Opinion No. 534 summarily denied the certificate requested by Alabama-Tennessee in Docket No. CP66-336, thereby preventing Alabama-Tennessee from meeting the requirements of Corinth in excess of its existing delivery capacity. It directed TGP to establish a connection with the facilities to be constructed by Corinth and to deliver into such facilities for the account of Alabama-Tennessee until February 1, 1970, Corinth's natural gas requirements in excess of 5,300 Mcf per day, which the Commission found to be the capacity of Alabama-Tennessee's existing lateral line.

But Opinion No. 534 did much more than require TGP to provide supplementary service to Corinth. It provided that on and after February 1, 1970, TGP should sell and deliver to Corinth *its entire requirements* pursuant to TGP's G-1 rate schedule. By this action, it revoked its earlier authorizations for Alabama-Tennessee to serve Corinth and denied Alabama-Tennessee the use of the facilities already built for such service in accordance with the certificates previously granted by the Commission.

The rationale given for the Commission's action was twofold. First, the Commission concluded that Corinth would ultimately effect savings by purchasing from Alabama-Tennessee's supplier rather than from Ala-

bama-Tennessee. Second, it concluded that the losses accruing to Alabama-Tennessee and its resale customers from the revocation of its certificate authority to serve Corinth would be insubstantial.

Alabama-Tennessee filed an application for rehearing and stay and a request to reopen the proceedings to consider more desirable alternatives, such as rate differentials which would provide Corinth with rate reductions approximating the savings which Corinth would obtain by direct service from TGP. By its order issued January 29, 1968, the Commission denied Alabama-Tennessee's application for rehearing as well as an application for rehearing filed by TGP (J.A. 132-36).

III. The Decision of the Court of Appeals.

Alabama-Tennessee on March 6, 1968, petitioned the Court of Appeals for the Fifth Circuit for review of Opinion No. 534. Following briefing, and oral argument on November 7, 1968, the court on August 4, 1969 issued its opinion and judgment affirming the Commission in its entirety.

The court below held that the Commission had the power to direct the commencement of new service by TGP in substitution for Alabama-Tennessee's previously certificated service without regard to Alabama-Tennessee's investment in facilities. In so doing, the court held that the expiration of the service agreement between Alabama-Tennessee and Corinth was controlling and that the Commission's action neither revoked nor modified the certificates of public convenience and necessity previously granted to Alabama-Tennessee authorizing service to Corinth (*Infra,* p. 4a). The court thereby evaded Alabama-Tennessee's principal

contention that under the *Seatrain* doctrine, *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424 (1947), the Commission is powerless to abrogate certificates authorizing service, when that service is being rendered in strict conformance with the representations made by the pipeline and relied upon by the Commission in issuing such certificates.

To support its conclusion, the court observed that the Commission would have lacked power to require continued service from Alabama-Tennessee if Corinth had sought to substitute service from a non-jurisdictional source at the expiration of its contract. Nevertheless, the court recognized that this is not the situation here since the Commission in this case has ordered and directed substitute service by TGP, an interstate pipeline company over which it has jurisdiction (*Infra*, pp. 4a-5a).[1]

In further support of its conclusion that the Commission had not modified or revoked Alabama-Tennessee's certificates, the court below held that the Commission's action was consistent with Section 7(g) of the Act which provides that the Commission may authorize a new pipeline supplier to serve an area already served by another (natural) gas pipeline company (*Infra*, pp. 4a-5a). This holding failed to recognize that TGP is not a new pipeline supplier but has always been Alabama-Tennessee's sole supplier of natural gas.

The court below also rejected Alabama-Tennessee's contention that the Commission should have evaluated

[1] The Court erroneously refers to the Commission as granting a certificate to TGP authorizing the substitute service. The Commission did not certificate service by TGP, but over TGP's objection ordered and directed TGP to install facilities to enable it to serve Corinth.

Corinth's proposal pursuant to Section 7(b) of the Act since Alabama-Tennessee was being forced to abandon service to Corinth to the detriment of Alabama-Tennessee's other customers in other states. As to this issue, the court adopted the Commission's view that the only purpose of Section 7(b) is to protect those to whom service is being terminated. In so holding, the court specifically rejected Alabama-Tennessee's reliance upon *United Gas Pipe Line Co.* v. *Federal Power Commission*, 385 U.S. 83 (1966) and *Michigan Consolidated Gas Company* v. *Federal Power Commission*, 283 F.2d 204 (D.C. Cir., 1960) *cert. den.*, 364 U.S. 913.

In addition the court below held that the Commission could direct TGP to serve Corinth pursuant to Section 7(a) of the Act. This holding was in response to Alabama-Tennessee's contention that Section 7(a) was not intended to empower the Commission to require the construction of duplicate facilities to provide a substitute for admittedly satisfactory service.

Otherwise, the Fifth Circuit held that the Commission had not erred by abrogating, in effect, the contract it had previously approved between Alabama-Tennessee and TGP, which contract provided for deliveries by TGP in amounts that contemplated resale to Corinth for a substantial period of time beyond 1970. Finally, the court ruled that the Commission had not erred by reason of (1) the absence of a rational basis for its action, (2) the absence of substantial evidence, and (3) its summary rejection of alternatives submitted by Alabama-Tennessee providing that gas should be sold to Corinth by TGP or that Alabama-Tennessee should institute a zone rate affording Corinth a lesser charge because of its proximity to TGP, Alabama-Tennessee's sole source of supply.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court Below Is in Conflict With Decisions of the United States Supreme Court Which Delineate the Limits of the Commission's Power To Modify and Revoke Certificates of Public Convenience and Necessity.

Significantly the Fifth Circuit's Decision at no point mentions the holdings of this Court which establish that a regulatory agency cannot revoke or modify a previously granted certificate or license, except to correct inadvertent ministerial error, unless such agency possesses explicit statutory authority to do so.[2] Even when such statutory authority exists, this Court has held that the agency must provide statutory notice and hearing on the question of revocation.[3] The absence of any discussion of these cases is particularly noteworthy because they were briefed and argued extensively before the court below.

The statement of the court below that the Commission's action did not pertain to certificates already granted Alabama-Tennessee (*Infra,* p. 4a) is an evasion of the main issue. It elevates form over substance. The Commission *directed* TGP to serve the entire requirements of Corinth including the portion of the service presently being rendered by Alabama-Tennessee. While the Commission did not state specifically that it was revoking Alabama-Tennessee's outstanding certificates authorizing service to Corinth, by its action, it made of them an empty shell.

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[2] *United States* v. *Seatrain Lines, Inc.,* 329 U.S. 424 (1947); *American Trucking Associations, Inc.* v. *Frisco Transportation Company,* 358 U.S. 133, 146 (1958).

[3] *Civil Aeronautics Board* v. *Delta Air Lines, Inc.,* 367 U.S. 316 (1961).

The reliance of the Commission and the Fifth Circuit upon the expiration of the contract term and the unwillingness of the purchaser to continue the arrangement is also contrary to the holdings of this Court. In *Sun Oil Company* v. *Federal Power Commission,* 364 U.S. 170 (1960), this Court held that a certificate granted by the Commission is not limited to the term of the underlying contract unless the Commission so provides by an express condition in the certificate order itself. The Commission did not so limit any of the numerous certificates issued Alabama-Tennessee authorizing service to Corinth. Also, it is evident from *United Gas Pipe Line Co.* v. *Federal Power Commission,* 385 U.S. 83 (1966) that the unwillingness of the purchaser to continue under a contractual arrangement does not preclude Commission review of the public convenience and necessity involved.

II. The Decision of the Court Below Is in Conflict With the Holding of Another Circuit and This Court With Respect to the Applicability of Section 7(b) of the Act.

The court below, contrary to holdings of this Court and the District of Columbia Circuit, erroneously views the abandonment section of the Act, Section 7(b), as being limited to the protection of the consumers' right to a continuing source of supply. Accordingly, it held that in an abandonment the Commission's concern is only with the impact on the ultimate consumers abandoned "—to wit the Corinth citizenry."[4]

[4] With regard to the benefits inuring to the "Corinth citizenry," whose interests are placed by the Commission above those of the other communities in Tennessee, Mississippi and Alabama served by Alabama-Tennessee, it is significant to note that not a penny of the hundreds of thousands of dollars of rate reductions and refunds provided by Alabama-Tennessee to Corinth since 1962 has reached the pockets of the "Corinth citizenry."

In *United Gas Pipe Line Co.* v. *Federal Power Commission, supra,* this Court held that the termination of service through existing facilities requires evaluation pursuant to Section 7(b), even if the facilities involved are those of the purchaser, the abandonment is at the purchaser's instigation, and the contract permits termination of purchases. In the instant case, it is service through the seller's facilities which is being terminated, but otherwise the conditions are analogous.

The District of Columbia Circuit, in *Michigan Consolidated Gas Company* v. *Federal Power Commission,* 283 F.2d 204 (D.C. Cir., 1960), *cert. den.,* 364 U.S. 913, rejected the notion that the effect on the customer to which service is being abandoned is the sole consideration in an abandonment case.[5] In *City of Pittsburgh* v. *Federal Power Commission,* 237 F.2d 741, 750-753 (D.C. Cir., 1956), the District of Columbia Circuit held that the Commission must consider the effect on a pipeline's rates of constructing new facilities needed to replace those facilities being abandoned. Moreover, *Pittsburgh* stands for the proposition that the failure to give such consideration is error even though the pipeline company has no immediate plans for constructing replacement facilities and no rate increase is proposed if and when such replacement facilities are built.

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[5] The Commission had authorized the abandonment on the basis that other customers of the seller, Panhandle Eastern Pipe Line Co., would be benefited, and the abandonment of service to Michigan Consolidated Gas Company would have no effect on the latter company because its loss of the Panhandle gas would be compensated by increased volumes from its other supplier. The court held, however, that the Commission erred by failing to consider the needs of gas consumers that would be served by the other supplier, absent the abandonment (283 F.2d at 217).

In the instant case, Alabama-Tennessee contends that due consideration has not been given to the economic effect of the abandonment upon Alabama-Tennessee and its other customers. Also, the Commission failed to give adequate consideration to Alabama-Tennessee's proposals of reasonable alternatives to the abandonment, as required by both *Michigan Consolidated,* 283 F.2d at 224 and *City of Pittsburgh,* 237 F.2d at 751.[6]

III. There Are Important Statutory Issues Involved.

In addition to the above-discussed direct conflict of the Fifth Circuit's determination with the holdings of this Court and other Courts of Appeals, certiorari should be granted because important interpretations of the Natural Gas Act are involved. The question of the Commission's power under Sections 7(c) and (e) to modify and revoke certificates of public convenience and necessity and the requirement of hearing and notice in connection therewith has already been discussed with regard to the conflict with *Seatrain* and other cases.

There is also presented the important question of whether there is a limitation upon the Commission's power under Section 7(a) of the Act to direct a pipeline company to serve a distributor in replacement of adequate service being rendered by another pipeline company pursuant to certificate authorization, thus permitting facilities of the replaced pipeline to fall into disuse at the expense, and to the detriment, of the other customers. The Court of Appeals' holding that the Commission's order directing new service under

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[6] See also *Scenic Hudson Preservation Conference* v. *Federal Power Commission,* 354 F.2d 608 (2nd Cir., 1965), *cert. den.,* 384 U.S. 941.

Section 7(a) does no more than could be done pursuant to a certificate application under Sections 7(c) and (e), misses the point. Alabama-Tennessee submits that even upon TGP's application the Commission could not issue a certificate authorizing the new service supplanting the previously certificated service by TGP's customer Alabama-Tennessee. Nevertheless, Alabama-Tennessee further submits that the lack of volition on the part of TGP imposes upon the Commission an additional duty to assure that its action is necessary or desirable in the public interest.

Combined with the above issues is the question of the meaning of Section 7(g) of the Act. This section provides that nothing in Section 7 of the Act shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural gas company. Alabama-Tennessee submits that this section should be read in the light of this Court's holding that the benefits of competition in the natural gas industry are achieved by competing applications for new increments of supply, *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 660 (1964). This is wholly contrary to the view of Section 7(g) espoused by the Commission and the Fifth Circuit that the section supports the complete replacement of a long-term certificated supplier by its own supplier.

The issues posed above are vital to Alabama-Tennessee and its customers. Alabama-Tennessee was originally certificated, and has grown under numerous subsequent certificate orders of the Commission, as a small regional pipeline. The size, location and economic feasibility of its system have been determined by the

Commission in the light of the needs of its customers, who, in this respect are mutually interdependent. Alabama-Tennessee, on the other hand, has been solely dependent upon TGP for its gas supply throughout its existence. Now, in the interests of a single customer and without regard for the importance of its regional services it finds itself characterized as an unnecessary middleman.

In addition, the issues posed are of major concern to the natural gas pipeline industry and are extremely important in prescribing the correct manner in which the Commission must administer the Act. Pipelines which initially occupied fairly well defined corridors from the supply fields to major markets have now expanded into areas adjacent to markets served by other pipelines. Furthermore, long-term contracts originally executed when service commenced a number of years ago are in various instances approaching expiration. As a result, there is an increasing likelihood of competition among pipelines. The fundamental questions that Alabama-Tennessee seeks to have reviewed would aid the Commission and the industry in ascertaining if future competitive applications should be limited to incremental requirements or whether they may also propose to displace in their entirety existing services of certificated suppliers. Moreover, if a certificated supplier of long standing may be displaced, what consideration must be given to its past satisfactory service and the economic effect of such displacement upon supplier's other customers.

The above questions have not previously been determined by this Court or the Courts of Appeal in the factual content presented by this case. Several Federal appellate cases have been directed toward service

of incremental requirements,[7] and while there are cases pertaining to replacement of a supplier, these cases did not involve the total revocation of a certificate for a service specifically authorized by the Commission.[8] In no event was it argued in any of those cases that the authorization of a substitute service constituted the revocation of a prior certificate and a violation of the holding of this Court in *Seatrain* and similar cases.

CONCLUSION

For these reasons, it is urged that this petition for certiorari be granted.

Respectfully submitted,

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[7] *Panhandle Eastern Pipe Line Company* v. *Federal Power Commission*, 169 F. 2d 881 (D.C. Cir. 1948) *cert. den.*, 335 U.S. 854; *Home Gas Company* v. *Federal Power Commission*, 231 F. 2d 253 (D.C. Cir. 1956) *cert. den.*, 352 U.S. 831; *Atlantic Seaboard Corporation* v. *Federal Power Commission*, 397 F. 2d 753 (4th Cir. 1968).

[8] *Kentucky Natural Gas Corp.* v. *F.P.C.*, 159 F. 2d 215 (6th Cir. 1947). (Replacement of service existing prior to the Act and granted "grandfather" authorization.) *Cincinnati Gas & Electric Company* v. *Federal Power Commission*, 389 F. 2d 272 (6th Cir. 1968) *cert. den.*, 393 U.S. 826. (Replacement of uncertificated service by an intrastate distributor.) *Atlantic Seaboard Corp.* v. *Federal Power Commission*, 397 F. 2d 753 (4th Cir. 1968). (Continued service and use of facilities under existing certificate authorization, but with possibly reduced levels of off-peak deliveries.)

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25862

ALABAMA-TENNESSEE NATURAL GAS COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

Petition for Review of Orders of the Federal Power Commission (Alabama Case)

(August 4, 1969)

Before BROWN, Chief Judge, THORNBERRY, Circuit Judge, and TAYLOR, District Judge.

TAYLOR, District Judge: This is a proceeding to review Orders of the Federal Power Commission (Commission) issued November 30, 1967 and January 29, 1968. The November 30, 1967 Order directed Tennessee Gas Pipeline Company (TGP), an interstate natural gas pipeline company, to interconnect its facilities with the facilities of City of Corinth, Mississippi, (Corinth), and beginning February 1, 1970 sell natural gas to Corinth for distribution to its customers. The November 30 Order also denied the application of Alabama-Tennessee Natural Gas Company (A-T or Petitioner), an interstate natural gas pipeline company, and Corinth's present supplier of natural gas, for authority to construct additional lateral line capacity to sell increased volumes of gas to Corinth. The Order issued January 29, 1968 denied Petitioner's application for rehearing and stay. Petitioner asserts that the Commission exceeded its statutory powers by:

a. modifying and revoking past certificate authorizations to A-T;

b. failing to test its action according to Section 7(b) of the Natural Gas Act governing abandonment of certificated facilities and service;

c. misapplying Section 7(a) of the Act by ordering the construction of duplicate facilities to serve a market already adequately served; and

d. abrogating a contract which it had previously approved.

It is further urged by Petitioner that the Commission's exercise of power was not rationally based. Disagreeing with these contentions and being of the opinion that the Commission acted in the public interest, we affirm the Opinion and Orders of the Commission.

Petitioner is an interstate natural gas pipeline company which has Corinth among its purchasers for resale. The service contract between the two runs until February 1, 1970. Petitioner purchases its entire natural gas supply from TGP. It now receives the gas a short distance from Corinth, carries it three miles through its system and makes delivery to Corinth through a 3.5 inch diameter lateral pipeline 2.5 miles in length, which is no longer adequate to meet the growing needs of the city. For a number of years Petitioner has been supplying Corinth with gas in excess of the maximum daily quantity of 3,850 Mcf specified in the contract and has been paid therefor in accordance with agreed demand and commodity charges. Corinth, having become disenchanted with Petitioner, whether rightly or wrongly, refused to execute a new service agreement providing for a greater maximum daily quantity and extending the contract beyond its 1970 expiration date. The present proceedings commenced when Alabama-Tennessee filed an application with the Commission for a certificate of public convenience and necessity authorizing construction of a 2.5 mile, 3.5 inch diameter pipeline, paralleling the one already in existence between Alabama-Tennessee and the city, upon

condition that Corinth be required to enter into a new contract for increased maximum daily quantities and for an extended period. This proposed facility was estimated to cost something in excess of $42,000.00.

Corinth intervened in opposition to the application and thereafter filed an application, under Section 7(a) of the Natural Gas Act, 15 U.S.C. 717f(a), for an order directing Tennessee Gas to connect its facilities to those of Corinth and to sell Corinth the gas needed in excess of the 3,850 Mcf per day specified in its contract with Alabama-Tennessee until February 1, 1970, and 6,550 Mcf per day (the city's estimated total requirements) thereafter. The cost to the city of the physical connection was estimated to be about $100,000 and the resultant saving in gas costs would be, it was claimed, $100,000 annually when Tennessee Gas would be supplying Corinth's full requirements.

On motion of Petitioner, the two applications were consolidated. After hearings and briefing, the examiner, save in respects not here at issue, denied Petitioner's application and granted Corinth's on April 28, 1967. The Commission, with some modifications, concurred. The Commission found that the substitution of Tennessee Gas as its supplier would result in a 20-year saving to Corinth of about $2,000,000.00. It was also found that the loss of sales to Corinth would be more than compensated for by normal growth in Alabama-Tennessee's sales to others and that the detriment to Alabama-Tennessee would not be serious. Thus, in 1964, Alabama-Tennessee's peak-day load was 67,841 Mcf and its annual sales were 11,261,946 Mcf. The estimate for 1966 was a peak of 89,710 Mcf and an annual volume of 12,914,200 Mcf. Both these sets of figures include sales to Corinth. Even without sales to Corinth, it was estimated that Alabama-Tennessee's 1970 peak would be 96,340 Mcf and its volume 16,195,400 Mcf, a substantial increase over the actual and estimated past. The Commission further found that the unamortized cost of the

existing Corinth lateral pipeline and metering facilities would be approximately $40,000 by February 1, 1970, the contract termination date. Of this amount 60% would be the cost of meter stations which would have some salvage value. The balance, the Commission held, could be written off over a period of years so that the adverse effect on Alabama-Tennessee would be negligible.

Alabama-Tennessee's primary contention is that the Commission's approval of Tennessee Gas as the supplier for Corinth, with the resultant termination of sales by Alabama-Tennessee to Corinth, constitutes an invalid revocation of its certificate of public convenience and necessity authorizing sales by it to Corinth. The certificates upon which Alabama-Tennessee relies do authorize it to sell gas to the city of Corinth which distributes gas locally, but this authorization in no way assures Alabama-Tennessee that Corinth would purchase the gas for the Commission has no authority to require a local distributor to contract for purchase, or accept delivery of natural gas. Michigan-Wisconsin Pipe Line Company, 6 FPC 1, 34 (1947), affirmed *sub nom. Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 169 F.2d 881 (CADC), certiorari denied, 335 U.S. 854 (1948). Such assurance lay only in Corinth's willingness to purchase gas under a long term contract or otherwise. Under these circumstances pipeline companies have generally attempted to obtain long term contracts with distribution companies, and it is noted that if gas could be obtained from a local intrastate source the Commission has no power at all to prevent the separation of the purchaser. What the Commission did in this case was to grant a certificate to TGP and denied an application for a certificate for expanded service to A-T. The proceedings in no way pertained to certificates already granted to A-T. The power to grant additional certificates for an area already serviced is clearly granted by 7(g), which provides in part that:

> "Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity

for service of an area already being served by another natural gas company."

The Commission could at the termination of a long term contract require the distributor to continue dealing with the original supplier by refusing to certificate a substitute supplier if the only alternative gas supply is from another interstate pipeline. This possibility, however, could in no way convert a certificate authorizing sales to a willing customer into a vested right under the Natural Gas Act to continue serving a particular customer indefinitely. A certificate of public convenience and necessity is not a grant of a monopolistic position in a particular area. The courts have on occasion recognized that the above quoted language of Section 7(g) makes clear that competition from markets is contemplated under the Act. *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, supra at 884; *Home Gas Company* v. *F.P.C.*, 231 F.2d 253, 257 (CADC), certiorari denied, 352 U.S. 831 (1956); *Cincinnati Gas & Electric Co.* v. *F.P.C.*, 389 F.2d 272 (CA 6, 1968), petition for certiorari pending, S.Ct. No. 99, O.T. 1968. The Fourth Circuit has recently said that the "Natural Gas Act does not expressly limit a second supplier to incremental sales, and neither the commission nor the courts have imposed such a rigid exclusion. The Act's primary criterion for certification is the public interest." *Atlantic Seaboard Corp.* v. *F.P.C.*, 397 F.2d 753, (CA 4, 1968). A-T's contention in this regard is without merit.

As to the assertion that the Commission should have tested its action according to the standards of Section 7(b) the Commission said:

> "A-T contends that the issue of the loss of Corinth as a customer should be governed by the abandonment principles of Section 7(b) which requires a hearing and finding that 'public convenience or necessity permit such abandonment.' This position that a customer seeking a new source of supply is analogous to an

abandonment proceeding is a distortion of the purposes of Section 7(b) which is designed to protect the consumer's right to a continuing source of supply. It is not designed to bind the customer to any given source of supply.

"A-T's reliance on *Michigan Consolidated Gas Co.* v. *F.P.C.*, 382 F.2d 204 (CADC 1960), *cert. den.* 364 U.S. 913, in support of its thesis that this must be considered an abandonment is not well taken. The consideration and emphasis in an abandonment case, as the court there indicated, is the impact *on the party being abandoned.* In the instant case the party being abandoned—more correctly, separated; albeit at its own request—is Corinth, not the other customers of A-T. The other customers will continue to be served. Hence, even if the Commission were to consider that Corinth's application is, as A-T contends, subject to Section 7(b), it would be constrained to determine the impact upon the ultimate consumers abandoned by (or separated from) A-T—to wit, the Corinth citizenry. When viewed in such light, the public convenience and necessity loom largely in favor of allowing the consumers access to lower priced gas."

We agree with the Commission's construction of Section 7(b).

Any reliance which A-T places on *United Gas Pipe Line Co.* v. *F.P.C.*, 385 U.S. 83 (1966), is ill-founded. In that case, United was certified to construct a pipeline to a producing field whose operators contracted to sell to United. United did construct the pipeline and then abandoned it. Thus the *United* case, unlike this case, concerned an abandonment by the unilateral decision of a pipeline company over which the Commission had jurisdiction, rather than a new connection to a local distributor as in this case. The Supreme Court said, in part, "We hold only that United has abandoned facilities and service without the consent

of the Commission and that it must reactivate those facilities and restore the service until and unless the statutory consent is obtained." As the Commission observed, Section 7(b) is "designed to protect the consumer's right to a continuing source of supply. It is not designed to bind the consumer to any given source of supply." The fact remains that if Corinth chose to utilize another form of energy it could have terminated A-T's service without the Commission's consent.

A-T's contention that Section 7(a) was never intended to enable a distributor of natural gas to displace a certificated supplier which has fully and adequately performed its authorized function is likewise without merit.[1] A-T's certificate of authority to serve Corinth was not revoked Section 7(g) makes clear the Commission's power to grant more than one certificate of public convenience and necessity for one service area.

Section 7(e) directs the Commission to grant such certificates to any qualified applicant. Also, the Commission has the power to direct extension of services by a certificated company under 7(a). With these factors in mind, the Commission was well within its power to grant a certificate of public convenience and necessity to TGP to serve Corinth or to direct TGP to make connection with Corinth's pipeline. As was said in *Home Gas Co.* v. *F.P.C.*, 231 F.2d 253 (DCCA 1955):

". . . Petitioners contend that, assuming the Commission has power under the Act, 15 U.S.C.A. § 717(a),

---

[1] Section 717(a). "Whenever the Commission . . . finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public . . . if the Commission finds that no undue burden will be placed upon natural-gas company thereby . . . ."

(e) and (g), to grant a certificate of public convenience and necessity to a second supplier for service to an area already being served, the Commission has no power to require such service by order pursuant to § 717f(a) ....

"To uphold petitioner's contentions would in effect force us to consider the above noted sections as being mutually exclusive. This we cannot do. Indeed, we find them complementary. No basis exists in the legislative history of the Act, and certainly none in the plain language of the text, for the creation of a third limitation on § 717f(a), as petitioners urge, namely, where the area involved is already being served by a natural gas company." pp. 257-258.

Petitioner A-T also asserts that the Commission had no power to abrogate the contract between A-T and TGP which it had previously approved. This contract became effective on May 10, 1966 for a term expiring November 1, 1986 and was approved by the Commission with knowledge that 4700 Mcf per day was included for Corinth. What has been heretofore said must indicate our holding with reference to this contention of A-T. A contract between A-T and TGP, even though approved by the Commission, could not have the effect of creating a monopoly for A-T or giving a vested right to A-T to perpetually serve Corinth. And certainly the contract could not have the effect of abrogating the Natural Gas Act and the power of the Commission to serve the public interest. As the examiner pointed out, when A-T made the contract with TGP it knew "that the sales contract with Corinth expired in 1970" and A-T "cannot impose additional obligations on a customer simply by obligating itself to a supplier."

Petitioner's remaining points actually go to the question as to whether or not the Commission's exercise of power was (a) rationally based, and (b) supported by substantial evidence. The facts are not disputed. The substitution of TGP for A-T will substantially reduce Corinth's cost;

A-T's resultant loss of volume will be more than offset by normal growth; and the undepreciated cost of its facilities that will be rendered useless by the substitution will not only be minuscule but amortizable over a period of years as well. Both the examiner and the Commission found that the adverse effect on Alabama-Tennessee and its remaining customers would be negligible. A-T, without disputing the basic facts, criticizes the Commission's alleged failure to fully evaluate the detriment the loss of Corinth would cause petitioner. It contends that a proper consideration of loss of profits must take into account the cost of new facilities needed to serve the growth that will offset the lost volumes. Petitioner, however, has supplied no specific information as to such costs nor as to how such costs, if any, would compare with the cost of the facilities for which A-T sought and was denied a certificate. Without this information resultant detriment may not be assumed. *Lynchburg Gas Company* v. *F.P.C.*, 336 F.2d 942, 947-948 (CADC, 1964). See also *Atlantic Seaboard Corporation* v. *F.P.C.*, supra; *Cincinnati Gas & Electric Co.* v. *F.P.C.*, supra. A-T is really arguing the undesirable fact that it and perhaps its other customers would be better off with Corinth as a customer than without it, but as pointed out in the Lynchburg and Atlantic Seaboard cases, supra, this is not the decisive test but merely a factor. As noted by the Commission, to permit this consideration to be controlling "would inevitably bind a customer to its existing supplier, thus effectively preclude the realization of the fruits of competition".

A-T also complains that the Commission rejected out of hand the alternative of a "transportation" or "delivery for the account of" arrangement under which A-T would make delivery of the gas for the account of Tennessee Gas and charge a transportation fee therefor. In this connection the Commission correctly held:

> "* * * Were A-T [Alabama-Tennessee] to transport the gas, the charges would either have to be allocated

directly to Corinth, in which event they would exceed the costs of transportation via a Corinth built lateral, or they would have to be rolled into A-T's cost for the entire system. This latter alternative would in effect not only require other A-T customers to bear the burden of some share of the transportation charges, but would result in Corinth's share exceeding its cost of transport via a Corinth owned lateral. Accordingly, considered on its own merits or comparatively with these alternatives, the proposal which we are certificating results in substantial savings to Corinth and is in the public interest."

A-T also faults the Commission for dismissing its rate zone alternative which would result in a reduction in Corinth's rates and an increase in the rates of customers which are more remote from the source of supply. It appears from the record that this proposal came on the last day of the hearing and no evidence was introduced or sought to be introduced in this regard. The Commission correctly pointed out that a change in the rate structure could not be made without a full-blown rate case with notice and opportunity to intervene to all customers and interested parties not represented in this case. This would result in extensive delay which might cause Corinth to suffer from an insufficient gas supply for the coming season.

From what has heretofore been said it is apparent that the Commission's orders are supported by substantial evidence and had a plainly rational basis. Its decision as to where the public interest lay was an exercise of regulatory authority entrusted by Congress to its informed judgment. *Permain Basin Area Rate Cases*, 390 U.S. 747 (1968), and *Atlantic Seaboard Corp.* v. *F.P.C.*, supra.

Accordingly, the opinion and orders of the Commission are

AFFIRMED.

Date: .....

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1968

No. 25862

ALABAMA-TENNESSEE NATURAL GAS COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

Petition for Review of Orders of the Federal Power Commission (Alabama Case)

Before BROWN, Chief Judge, THORNBERRY, Circuit Judge, and TAYLOR, District Judge.

Judgment

This cause came to be heard on the petition of Alabama-Tennessee Natural Gas Company, for review of Orders of the Federal Power Commission issued on January 29, 1968, in Docket Nos. CP66-336 and CP67-62, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the Orders of the Federal Power Commission in this cause, be, and the same are hereby affirmed.

August 4, 1969

Issued as Mandate: Oct. 6, 1969

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25862

ALABAMA-TENNESSEE NATURAL GAS COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

Petition for Review of Orders of the Federal Power Commission (Alabama Case)

On Petition for Rehearing and Petition for Rehearing En Banc

(September 24, 1969)

Before BROWN, Chief Judge, THORNBERRY, Circuit Judge, and TAYLOR, District Judge.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX D

Excerpts From the Natural Gas Act (15 U.S.C. § 717 et seq)

SEC. 4. (a) * * *

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service. [52 Stat. 822 (1938); 15 U.S.C. § 717c (b)]

* * *

SEC. 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers. [52 Stat. 824 (1938); 15 U.S.C. § 717f (a)]

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. [52 Stat. 824 (1938); 15 U.S.C. § 717f (b)]

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the

hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f (c)]

* * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f (e)]

* * *

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company. [56 Stat. 84 (1942); 15 U.S.C. § 717f (g)]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 987

ALABAMA-TENNESSEE NATURAL GAS COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION, CITY OF CORINTH, MISSISSIPPI, *Respondents.*

SUPPLEMENTAL APPENDICES

TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

		Page
APPENDIX E	Opinion No. 534 of the Federal Power Commission	J.A. 103
APPENDIX F	Order of the Federal Power Commission Denying Rehearing, Stay, and Reopening of the Record	J.A. 132

IN THE

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SUPPLEMENTAL APPENDICES

TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Opinion No. 534 of the Federal Power Commission and its order denying rehearing are separately reprinted herein from the Joint Appendix (J.A.). Page numbers of the record as certified are printed in bold face type. Numerical paging of the Joint Appendix is printed in light-faced type at the bottom of each page.

1141

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Interconnection of Facilities; Sale of Natural Gas
Mutual Exclusivity

Before Commissioners: Lee C. White, Chairman; L. J. O'Connor, Jr., Charles R. Ross, Carl E. Bagge, and John A. Carver, Jr.

Docket No.
CP66-336

ALABAMA-TENNESSEE NATURAL GAS COMPANY

Docket No.
CP67-62

CITY OF CORINTH, MISSISSIPPI v. TENNESSEE GAS PIPELINE COMPANY, A DIVISION OF TENNECO INC.

Opinion No. 534

Opinion and Order Directing Interconnection of Facilities and Sale of Natural Gas and Denying Application for Construction of Pipeline.

(Issued November 30, 1967)

WHITE, Chairman:

These consolidated proceedings involve: (1) an application by Alabama-Tennessee Natural Gas Company (A-T) pursuant to Section 7(c) of the Natural Gas Act (Act) for authorization, at an estimated cost of $42,900, to construct and operate 2.5 miles of 3-½-inch O.D. lateral pipeline paralleling existing 3-½-inch O.D. lateral pipeline and to increase its ability to deliver gas to Corinth under maximum daily flow conditions from 5,725 Mcf to approximately 11,500 Mcf; and (2) an application by the City of Corinth

(Corinth) under Section 7(a) of the Act requesting the Commission to issue an order directing Tennessee Gas Pipeline Company (TGP) to establish an interconnection with facilities to be constructed by Corinth and to sell to Corinth during the years 1967, 1968, 1969 and up to January 31, 1970 all of Corinth's natural gas requirements over and above its present contract quantity with A-T of 3,850 Mcf per day, and on and after February 1, 1970 all of Corinth's natural gas requirements.

1142

Background

The City of Corinth, Mississippi, located just south of the Mississippi-Tennessee state line owns and operates a municipal gas distribution system and distributes natural gas to consumers located within the corporate limits of the City and in an area immediately adjacent to the City's boundaries. Natural gas service was initiated in June 1952 and all of its natural gas requirements from that date and to the present have been and are supplied by A-T under a succession of agreements expiring February 1, 1970. In addition, Corinth operates a peak shaving plant capable of producing 80 Mcf per hour from which it supplements its natural gas supply when necessary to satisfy its customer's need. It is estimated that the plant will supply 600 Mcf to the system on the peak day. As of December 31, 1965, the City served a total of 3,226 customers and it is estimated that this will increase to 4,150 by 1972.

The capacity of A-T's lateral pipeline serving Corinth has been reached, and if A-T is to continue to meet Corinth's requirements, it will be necessary for it to construct 2-½ miles of loop line from its main transmission lines to Corinth's system to provide additional capacity.

The present service agreement between Corinth and A-T specifies a maximum daily quantity of 3,850 Mcf but since 1960, or possibly earlier, A-T has been delivering volumes of gas to Corinth in excess of 3,850 Mcf. In January 1966, A-T delivered a maximum daily volume of 5,229 Mcf for which the City has been billed and paid demand charges, and in December 1966 a new peak volume of 5,243 Mcf was established on which Corinth will pay a demand charge through November 1967, unless this volume is exceeded at a later date. The City has been unwilling to enter into a new service agreement with A-T after the expiration date of the present agreement on February 1, 1970, and Corinth is now requesting an order of the Commission directing TGP to sell to Corinth, commencing in 1967, its estimated natural gas requirements in excess of 3,850 Mcf until the expiration of its contract with A-T on February 1, 1970, and at that time and thereafter to sell to Corinth all of its estimated natural gas requirements.

1143

In order to obtain gas from TGP, Corinth proposes to construct 2.75 miles of 8-⅝-inch O.D. pipeline from a proposed regulator station at the eastern edge of the City to a point of connection with TGP's Kinder-Portland line. The total estimated cost of this project is $100,000, to be financed with cash which the City now has on hand. It is estimated that the cost of facilities to be constructed by TGP would be approximately $26,275. The maximum flow capacity of Corinth's proposed connecting line is about 16,083 Mcf per day, assuming TGP's minimum guaranteed delivery pressure of 200 psig at TGP's mainline and a pressure at the city gate of 125 psig.

Holding

Presiding Examiner Arthur H. Fribourg's initial decision of April 28, 1967, granted in part and denied in part

the Section 7(a) application of Corinth. He directed TGP to connect its facilities with those of Corinth prior to February 1, 1970, and on February 1, 1970 to commence the sale of natural gas to Corinth under TGP's G-1 rate schedule. He denied Corinth's request for an order directing TGP to connect its facilities with Corinth's by the 1967-1968 heating season, and to sell to Corinth from that date to the date of termination of Corinth's service agreement with A-T Corinth's requirements in excess of 3,850 Mcf, the maximum daily quantity stated in the Corinth-A-T service agreement. He denied A-T's application to construct and operate a lateral for service to Corinth paralleling the existing service lateral but authorized A-T to loop a segment of the existing service lateral which would provide sufficient capacity until February 1, 1970, for the sale and delivery to Corinth of its estimated requirements to that date, provided Corinth contributes to A-T 90 percent of the cost of the loop.

This proceeding which is before us on exceptions to the initial decision, involves mutually exclusive proposals within the meaning of the *Ashbacher* doctrine.[1]

We agree with the Examiner's conclusion that an order should issue under Section 7(a) of the Act requiring TGP to connect its facilities with those of Corinth and on February 1, 1970 to commence the sale of natural gas to Corinth under TGP's G-1 rate schedule. We also agree that A-T's application to construct and operate a lateral for service to Corinth paralleling the existing service lateral should be denied. However, for reasons

[1] *Ashbacher Radio Corp.* v. *F.C.C.*, 326 U.S. 327 (1945).

expressed herein we are not authorizing A-T to loop a segment of the existing service lateral as the Examiner

recommended for the interim period ending February 1, 1970, but instead are ordering the delivery of natural gas by TGP to Corinth through facilities to be constructed by Corinth and connected therewith by TGP for the account of A-T of that volume of natural gas which exceed the safe capacity of A-T's existing lateral.

The problem presented by this case is a simple but important one which illustrates the increasingly competitive nature of the pipeline industry: whether a distributor customer of a pipeline must continue to take from the present supplier even though a cheaper source of gas is readily available. Resolution of this issue necessarily involves a weighing of the benefits to the distributor and its customers as well as the impact which a changeover would have on the present supplier and its customers. Consideration of the entire record in this proceeding convinces us that the public interest is best served by authorizing the changeover, thus taking advantage of the economies which competition has made available.

Discussion

Corinth desires to purchase gas from TGP under the same terms and conditions and rate as appears in the latter's G-1 rate schedule and the city's studies are based on this premise. By the arrangement proposed by Corinth, it would realize substantial savings as compared to purchasing gas from A.T.[2] Although there would be no savings in the year in which the purchase of gas from

[2] The charges under the presently effective G-1 rate schedules of TGP and A-T are:

	TGP @ 15.025	TGP @ 14.735	A-T @ 14.735
Demand Charge	$ 1.99	$ 1.95	$ 2.69
Commodity Charge	20.84¢/Mcf	20.44¢/Mcf	24.29¢/Mcf

(1144)

TGP is scheduled to commence, immediate savings would be realized thereafter as follows:

1969	$ 27,600
1970	32,000
1971	100,800
1972	97,100

1145

Over the 20-year term of the service agreement with TGP, the savings to the consumers from the city's purchase of natural gas from TGP would be at least $2,000,000 based on the projected level of purchases from TGP under rate schedule G-1.

A-T contends that the economic detriment to its other customers would be substantial if Corinth is supplied directly by TGP. It asserts that its gross profit on sales to Corinth in 1964 was $71,081, and claims that the loss of this business would be equivalent to 0.68 cents per Mcf when prorated among sales to its other customers.[3] Based on the expected increase in the Corinth load between now and 1971 A-T estimated the increase in annual gross profits thereon to be approximately $100,000.

As the Examiner correctly pointed out, it is improper to assume that loss of a particular customer shows the extent of deterioration to be expected, citing *Lynchburg Gas Co.* v. *F.P.C.*, 336 F.2d 942, 947-8. Loss may be more than offset by an increase in other sales.[4] Here the record shows that the reduction in sales which will result from the loss of the Corinth load can be expected to be offset by increases in sales to other customers of A-T. The company itself has made estimates of a peak day of 96,340 and

3 1964 is the basis for the rates made effective September 1, 1965, in A-T's latest rate case, 34 FPC 767.

4 *Columbia Gulf Transmission Co.*, Opinion No. 512, January 24, 1967.

annnal volume of 16,195,400 Mcf for wholesale sales in 1970, including Corinth. Elimination of the estimated Corinth load would leave peak day wholesale sales of 90,210 and annual wholesale sales of 15,204,400. This compares with an estimated 1966 peak of 89,710 and an estimated 1966 volume of 12,914,200, both of which, of course, include Corinth. The actual year 1964 was much below the 1966 estimate, so that the growth from 1964 to 1970, assuming the loss of the Corinth load in the latter year, exceeds that loss by a wide margin. In 1964 the peak was 67,841 Mcf and the annual volume was 11,261,946. The comparison of 1964 actual figures with 1970 estimates does not indicate that loss of the Corinth business in 1970 would burden A-T's other customers. Indeed, the prospective loss would be more than made up before it is actually

incurred, since it will be more than offset by normal growth elsewhere on the system.

A-T argues that it will incur a detriment due to the loss of the Corinth account because "the capacity now being used to serve Corinth will not be available to the other customers if the abandonment is permitted." It asserts, moreover, that additional sales to other customers will not offset loss of Corinth revenues since such additional sales must be first offset by additional costs of constructing, operating and maintaining the additional facilities required to produce them.

The Examiner's decision correctly points out that except for possibly $40,000, all of A-T capital investment in the Corinth line will have been recovered by 1970, and the $40,000 can, if necessary, be written off by A-T over a period of years without adverse effect on its remaining customers. Thus, A-T's argument is without merit, unless, of course, it is really contending that its loss of profits

from Corinth should be made up by its remaining customers. But there is no valid reason why the public interest should require that A-T's profit level be maintained by its remaining customers, and we have never so declared. Moreover, this $40,000 is not the true measure of economic detriment resulting therefrom to either A-T or its remaining customers.

A-T uses a composite group depreciation rate of 3.2 percent for all transmission properties which includes laterals, sales meter stations, and check meter stations; the three types of facilities included in the "Corinth lateral." Inherent in group depreciation theory is the assumption that some facilities will be retired before expiration of their average service life but these early retirements will be offset by facilities which remain in service longer than their average service life. Most natural gas pipeline companies subject to the jurisdiction of this Commission use a composite group depreciation rate, as does A-T, and for accounting purposes treat premature retirements as ordinary retirements. The Corinth lateral consists of pipeline, a sales meter station, and a check meter station which at February 1, 1970, will have estimated original cost and accumulated depreciation as follows:

1147

	Pipeline	Sales Meter Station	Check Meter Station	Total
Original Cost	$35,484	$25,978	$7,596	$69,058
Accumulated Depreciation	20,521	6,733	2,897	30,151
Net Original Cost	$14,963	$19,245	$4,699	$38,907

This of course, does not take account of the fact that any detriment to A-T may be minimized by salvaging some portion of the sales and check meter stations which

account for approximately 60 percent of the unamortized investment.

In considering whether Corinth should be required to compensate A-T for this detriment we conclude that it should not. The traditional ratemaking philosophy of this Commission has not been used on a policy of determining the cost of service for individual customers by isolating the costs of specific facilities necessary to serve that customer. Requiring Corinth to make a payment to A-T because it had not recovered, through depreciation charges, all capital costs related to the specific facilities necessary to serve Corinth would be inconsistent with this long-standing Commission ratemaking philosophy. Retirement of the Corinth lateral in 1970 will, we assume, be treated by A-T as an ordinary retirement in accordance with its regular depreciation practices and the theory underlying group depreciation.

We wish to make it clear, however, that the early retirement of facilities which may result from the switching of suppliers is an important, if only one, of the factors which must be weighed in determining whether a switchover is in the public interest. In this proceeding the impact resulting from the switchover is insubstantial; however, it is possible that in another proceeding this factor could be of such magnitude as to tip the scales against allowing a switch in suppliers, when it is considered together with all the other relevant factors.

We are not unmindful of the fact that A-T's growth would be even greater were it allowed to keep the Corinth load and that, as a result, its customers might enjoy some additional

economies. But we would be derelict in our duty if we were to ignore the immediate and measurable benefits to

Corinth on such a theoretical and speculative loss to other A-T customers. Such a rationale would inevitably bind a customer to its existing supplier, thus effectively preclude the realization of the fruits of competition. Moreover, this Commission in its recent decision in *Algonquin Gas Transmission Co,*. Opinion No. 522, June 27, 1967 (slip-op. p. 15) pointed out that "we have made clear 'that a pipeline has no vested interest in a market that must be perpetually protected by regulation.'" Citing *Columbia Gulf Transmission Co.,* Opinion No. 512, January 24, 1967, and *City of Hamilton, Ohio,* Opinion 513, January 24, 1967, in support. As we said in *Algonquin* "Congress has entrusted this Commission with a mandate to assure natural gas service to ultimate consumers at the lowest reasonable rates." On this record, service by TGP will effectuate that mandate.

In our consideration of A-T's probable future we are aware that its rates reflect tax savings resulting from the use of liberalized depreciation. In *Alabama-Tennessee Natural Gas Co.,* 31 FPC 208, aff'd 359 F. 2d 318 (CA5, 1966), we concluded that flow through was applicable to pipelines which maintain a growing or stable gross plant and that A-T was such a pipeline. The record here confirms the wisdom of that finding for, by A-T's own admission, even without Corinth it expects to serve increased loads through 1970. Moreover, as contemplated in *Alabama-Tennessee,* if subsequent events should establish that by reason of the loss of the Corinth load or for other reasons, A-T, other than temporarily, is no longer maintaining a growing or stable gross plant there will be ample opportunity for it to seek review of its rates and request appropriate relief.

A-T contends that the issue of the loss of Corinth as a customer should be governed by the abandonment principles of Section 7(b) which requires a hearing and finding

that "public convenience or necessity permit such abandonment." This position that a customer seeking a new source of supply is analogous to an abandonment proceeding is a distortion of the purposes of Section 7(b) which is designed to protect the consumer's right to a continuing source of supply. It is not designed to bind the customer to any given source of supply.

1149

A-T's reliance on *Michigan Consolidated Gas Co.* v. *F.P.C.*, 283 F. 2d 204 (CADC 1960), *cert. den.* 364 U.S. 913, in support of its thesis that this must be considered an abandonment is not well taken. The consideration and emphasis in an abandonment case, as the court there indicated, is the impact *on the party being abandoned.* In the instant case the party being abandoned—more correctly, separated; albeit at its own request—is Corinth, not the other customers of A-T. The other customers will continue to be served. Hence, even if the Commission were to consider that Corinth's application is, as A-T contends, subject to Section 7(b), it would be constrained to determine the impact upon the ultimate consumers abandoned by (or separated from) A-T—to wit, the Corinth citizenry. When viewed in such light, the public convenience and necessity loom largely in favor of allowing the consumers access to lower priced gas.

The discussion thus far has been based on the premise that Corinth would be eligible for service under TGP's presently effective rate schedule G-1. Subparagraph (a) of the G-1 rate provides that service under this schedule is available to any buyer:

> "(a) which will purchase said gas for resale in a specified area or areas which, at the date of the commencement of service by Seller to Buyer for such area or areas, was not being served with natural gas;"

Both TGP and A-T argue that since the area served by Corinth is now receiving natural gas service, Corinth is ineligible to receive service under the terms of TGP's presently-effective rate schedule G-1.[5] It is claimed Corinth is only eligible for firm service under TGP's rate schedule CD-1 and that by reason of the operation of the

1150

minimum bill provision in rate schedule CD-1, the cost of Corinth's proposed gas purchases from TGP would exceed that asserted by Corinth. Corinth, on the other hand, presented evidence attempting to show that the above existing tariff provision is unreasonable. TGP objected to the admission of Corinth's evidence relating to the reasonableness of its tariff. It argues that certificate cases are not the proper place to consider the reasonableness of filed tariff provisions, citing *Tennessee Gas Transmission Co.*, 32 FPC 112; *Atlantic Seaboard Corp.*, 28 FPC 1145; *Atlantic Seaboard Corp.*, 24 FPC 474; *Commonwealth Natural Gas Corp.*, 9 FPC 70.[6]

Whether the Commission should preclude consideration of reasonableness of tariff in a certificate case is not an issue which the Commission need face in reaching a decision herein inasmuch as we conclude that Corinth will be eligible to take service pursuant to TGP's G-1 rate schedule after January 31, 1970.

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[5] During the hearing TGP contended that even after 1970 Corinth would not continue to be eligible for G-1 service, since the area served by Corinth would be receiving natural gas service at the date Corinth proposes to commence purchasing gas from Tennessee. TGF did not, however, except to the Examiner's determination to the contrary.

[6] TGP also excepted to the Examiner's denial of TGP's motion to strike Corinth's evidence that TGP's "availability" provision in its G-1 schedule was unreasonable. Inasmuch as the Examiner expressly stated that he did not rely on this evidence TGP's exception to his denial appear to be moot.

The G-1 tariff was established in 1947 and up to 1951 it was available to any entire-requirements purchaser for resale who signed a contract limiting TGP's obligation to a maximum daily peak. In that year language was added to limit the availability to any such purchaser for resale in an area which, on the date of the contract, was not being served with natural gas. The present wording, which refers to the date of the commencement of service instead of the date of the contract but is otherwise substantially the same as the 1951 version, first appeared in 1954.

At least one change in the availability section appears to have been directed towards limiting the schedule to those customers who buy from TGP all the natural gas they sell in any area. In 1951, at the same time that the limitation here in issue appeared, there appeared a limitation confining the schedule to customers who own no natural gas production, do not purchase from producers, and have no underground gas

storage facilities. When this provision is read together with the other, it appears that the object was to limit the G-1 schedule to full-requirements purchasers for resale in areas whose entire natural gas needs were supplied by TGP throughout the year. It is clear, therefore, that the G-1 tariff is not available to Corinth before 1970. On the other hand, there can be no contradiction that in 1970, after termination of its A-T contract, Corinth will have only one source of supply, TGP. At that point the reason for requiring it to buy under the CD schedule disappears. It would then be a full-requirements customer, and would be in the same position towards TGP as any other full-requirements customer.

It is uncontested in the record that Corinth's present needs exceed A-T's maximum safe deliverability on the

installed lateral and that additional facilities are needed to handle the increasing load between now and February 1, 1970. It was in recognition of this and the fact that purchasing gas from TGP under its CD-1 schedule would be substantially more costly than the purchase of all the requirements from A-T that the Examiner recommended the looping of the existing A-T lateral, even though he fully recognized that the line would be of no further use after 1970. We see no reason for reaching this result which, as the Examiner recognized, necessitates the looping of a lateral which will have no economic value after 1970. Instead, therefore, we are permitting the immediate construction of the proposed lateral from Corinth to TGP which, in any event, will be needed for service after 1970; and ordering TGP to deliver to Corinth for the account of A-T the volumes of natural gas which exceed the safe capacity of the existing lateral.

Our holding here means that until February 1, 1970, Corinth remains a full-requirements customer of A-T, even though TGP is delivering part of those requirements directly. This resolution avoids both the economic waste inherent in looping the existing lateral and the additional cost which would be necessitated by receiving gas from TGP under its higher CD schedule. It also permits the continued use of existing A-T facilities to their maximum safe capacity.

1152

In determining that Corinth be permitted to build a lateral and to purchase from TGP at the G-1 rate beginning February 1, 1970, we have considered the alternatives of a transportation'' or ''delivery for the account of'' arrangement which would permit the continued utilization of A-T's existing Corinth lateral. However, either of these arrangements would be more costly than Corinth's proposal for a direct connection with TGP. Were A-T to

transport the gas, the charges would either have to be allocated directly to Corinth, in which event they would exceed the costs of transportation via a Corinth built lateral, or they would have to be rolled into A-T's costs for the entire system. This latter alternative would in effect not only require other A-T customers to bear the burden of some share of the transportation charges, but would result in Corinth's share exceeding its costs of transport via a Corinth owned lateral. Accordingly, considered on its own merits or comparatively with these alternatives, the proposel which we are certificating results in substantial savings to Corinth and is in the public interest.

There is some dispute about the maximum safe peak-day capacity of A-T's existing lateral. The Examiner found that this was 5,300 Mcf. We accept this figure as reasonably supported by the evidence introduced by Staff's witness and based on the USA Standard Code for Pressure Piping, Gas Transmission and Distributing Systems, American Society of Mechanical Engineers.[7]

The construction and interconnection by TGP and Corinth of their respective facilities will negate the necessity for enlarging A-T's present lateral and, accordingly, its application is denied. No useful purpose is served therefore in discussing the relative merits of A-T's proposed construction as against the looping of its lateral as ordered by the Examiner.

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[7] Calculating a peak hourly flow of 281 Mcf (peak-day 6,750 Mcf) and utilizing the same 5.3 percent ratio of peak hour to a peak-day revealed by A-T's own studies, Staff's figure would be 5,300 Mcf.

In the course of these proceedings and in its exceptions to the Examiner's decision, TGP contended that A-T should continue to be the exclusive source for Corinth since A-T performs a very valuable function as a regional

pipeline system. TGP contends that the solution to Corinth's problem is not to construct duplicate and unnecessary facilities but rather to correct A-T's rate design in an appropriate rate proceeding.

TGP's suggestion assumes that it would be proper to establish rate zones on the A-T system and that the rate zones so established would afford Corinth savings equivalent to those realized by direct purchase from TGP.

We do not believe that a decision whether or not the present applications are necessary or desirable in the public interest can await a determination whether A-T's rate structure should, after a full blown rate case, be redesigned to afford relief to Corinth. Moreover, we could not even begin to speculate at this time as to whether that would in fact be the result of a rate case; it is at least worth noting that A-T itself has not come forward with redesigned rates to reflect this possibility. The result we reach herein does not require our considering whether A-T's rate design should be changed and we see no public interest consideration which would be served by introducing this complex rate design problem into this proceeding.

The Commission further finds:

(1) Tennessee Gas Pipeline Company is a "natural gas company" within the meaning of the Natural Gas Act.

(2) The City of Corinth, Mississippi, is a municipality engaged in the local distribution of natural gas to the public.

(3) Alabama-Tennessee Natural Gas Company is a "natural gas company" within the meaning of the Natural Gas Act.

(4) It is necessary and desirable in the public interest that Tennessee Gas Pipeline be directed to establish phy-

sical connections of its gas transmission system with the existing and proposed facilities of City of Corinth, Mississippi.

(5) It is necessary and desirable in the public interest that Tennessee Gas Pipeline Company until February 1, 1970, deliver directly to the City of Corinth, Mississippi, for the account of Alabama-Tennessee Natural Gas Company all natural gas needed by the City of Corinth, Mississippi, as shall exceed 5,300 Mcf per day.

(6) It is necessary and desirable in the public interest that on and after February 1, 1970, Tennessee Gas Pipeline Company, pursuant to its G-1 rate schedule, sell and deliver natural gas to the City of Corinth, Mississippi.

(7) The proposed construction as set forth in the Section 7(c) application of Alabama-Tennessee Natural Gas Company is not required by the present or future public convenience and necessity.

(8) The sale and delivery of natural gas to the City of Corinth, Mississippi, will not place any undue burden on Tennessee Gas Pipeline Company nor impair its ability to service its existing customers.

The Commission orders:

(A) Tennessee Gas Pipeline Company will establish a physical connection of its transmission system with facilities to be constructed by the City of Corinth in accordance with its Section 7(a) application and on and after February 1, 1970, pursuant to the G-1 rate schedule of Tennessee Gas Pipeline Company, sell and deliver to the City of Corinth all of its natural gas requirements.

(B) Within 30 days of the completion of the facilities to be constructed by the City of Corinth, Tennessee Gas Pipe-

line Company shall until *February 1, 1970* deliver directly to the City of Corinth, for the account of Alabama-Tennessee Natural Gas Company, the natural gas requirement of the City of Corinth in excess of 5,300 Mcf per day.

1155

(C) The Section 7(c) application of Alabama-Tennessee Natural Gas Company is denied.

(D) Tennessee Gas Pipeline Company shall report to the Commission in writing the date of the connection of its facilities with the facilities of the City of Corinth, within ten days thereof.

By the Commission. Commissioner Carver concurring filed a separate statement appended hereto.

(SEAL)

GORDON M. GRANT,
Secretary.

1156

Docket No. CP66-336

ALABAMA-TENNESSEE NATURAL GAS COMPANY, ET AL

(Issued November 30, 1967)

CARVER, Commissioner, concurring:

The expiration of the service agreement between Corinth and Alabama-Tennessee in 1970, under precedent of the Commission to which I have not dissented, leaves Corinth free to change suppliers.[1] The use of section 7(a) of the Natural Gas Act as authority for the interim arrangement between now and the date of the expiration of the service agreement presents problems of a legal nature which I will discuss hereafter, but my reservations about the Commission's authority to do what it has done do not compel

[1] *City of Hamilton*, 37 FPC 209, Opinion No. 513, issued January 24, 1967.

a dissent, principally because the passage of time would render the question moot before the matter could be judicially tested.[2]

Therefore, I concur in the result, but feel compelled to state views which although perhaps not at variance with those of the Commission, nevertheless are not treated in the Commission's Opinion with the analytical depth I think warranted.

It is important to understand the physical situation of the parties. Alabama-Tennessee is a customer of Tennessee operating, under certificate from this Commission,[3] a 130-mile pipeline which presently serves, *inter alia*, Corinth, Florence, Sheffield, Athens, Decatur, and Huntsville. All of these municipalities have service agreements with Alabama-Tennessee, each taking peak-day volumes ranging between 2448 Mcf for Athens to 35,044 for Huntsville.

When the first service agreements were entered into with these municipalities, Tennessee supplied gas to Alabama-Tennessee in southwestern Tennessee. Since that

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[2] *Algonquin Gas Transmission Co.*, 37 FPC —, Opinion No. 522, issued June 27, 1967, presented the issue much more clearly and that case was not appealed.

[3] 7 FPC 251.

time, Tennessee has constructed two lines east of its mainline, each of which intersects the Alabama-Tennessee pipeline. The westerly of these two lines, the Kinder-Portland line, runs close enough to Corinth to precipitate the instant proceedings; it is to this line that the Commission is authorizing Corinth to connect.

Sheffield and Florence, both located east of Corinth, are equivalently proximate to the second Tennessee line—the Delta-Portland line. This line parallels the Kinder-Portland line.

The original service agreements with Sheffield and Florence expire shortly after the Corinth expiration date, respectively in 1970 and 1971.

This circumstance presents the Commission with the duty of considering the consequences of its action in authorizing Corinth to take advantage of the "savings" involved in purchasing "wholesale" from Tennessee, rather than "jobber" from Alabama-Tennessee.

One consequence is the prospect of so reducing the volume of Alabama-Tennessee's sales as to fix an undue burden on the remaining customers to pay for a disproportionate share of the fixed costs associated with the certificated investment of Alabama-Tennessee.

The other result is the prospect that for some reason associated with a regulatory decision, consumers of gas in Florence and Sheffield (or other communities) will be denied the reduction in purchased gas costs which the shift in suppliers authorized today makes possible for the consumers in Corinth.

On the face of it, the latter problem is the more real one. As to the former problem, the fact that based on 1966 actual sales, Sheffield, Florence, and Corinth together account for 23% of the jurisdictional volumes and 24% of the jurisdictional revenues of Alabama-Tennessee virtually dictates that further incursions into Alabama-Tennessee's markets will not be authorized lightly.

Furthermore, there is a difference in circumstance between Corinth and the other two towns. It is this difference which requires deeper analysis, since a different result would seemingly be justified if the whole of the

problem was presented to this Commission at one time. Specifically, only Corinth's entire contractual obligation

to Alabama-Tennessee expires in 1970—for the other two municipalities, the base load contracts expire in 1970 and 1971, but incremental volumes are furnished under service agreements which run twenty years from the date of execution, and thus do not expire coincident from the date of execution, and thus do not expire coincident with the base load agreement. The contracts for volumes other than the base loads run until 1985 and 1986, respectively for Florence and Sheffield.

The reason Corinth is differently situated is not to be found in a difference of circumstance, treatment, or policy so far as Alabama-Tennessee is concerned—rather it reflects the fact that Corinth after 1956 refused to sign any more superseding agreements with expiration dates beyond 1970, and as the Commission Opinion makes clear, Corinth's needs beyond 3,850 Mcf per day are not covered by any agreement other than Alabama-Tennessee's full requirements clause. Its peak has exceeded this amount since at least January 3, 1960.

Corinth formed the intention to shift to Tennessee, and by its own testimony, thereafter refused to enter into any new service agreements because ". . . it planned to purchase natural gas from Tennessee which had since completed its Kinder-Portland line located approximately 2-¾ miles from Corinth, and wanted to be free to do so at the expiration of its contract with Alabama-Tennessee." [Tr. 26]

It may help identify the regulatory problem presented here if we should postulate the circumstances of the original lateral from Alabama-Tennessee to Corinth being physically limited in its capacity to the originally-certificated peak volume of 3,850 Mcf. In other words, suppose that Alabama-Tennessee, instead of needing certificate authority to construct new facilities within 24 to 36 months of

the expiration of its agreement, had been asking for such authority five or ten years ahead of the expiration of the existing service agreement.

If the issue had been presented in such a context, would the Commission have supported Corinth in a refusal to sign an agreement beyond 1970, or would it have supported Alabama-Tennessee in a refusal to construct new facilities without 20 years' protection as to the new

1159

facilities?

The Commission, in such a situation, in all likelihood would have finessed the problem, as the Examiner did in the case now before us, by supporting Corinth's refusal to enter into an extended agreement, while ordering the city to contribute aid to the cost of the construction of the needed expansion. Presumably, the ninety percent share assessed to the city by the Examiner was related to the brevity of the remaining contract term.

But this would not have vitiated the issue which concerns me. In the framework of this case, that issue is not whether long-term, short-term, or indeed any service agreements, are in the public interest; it is rather the latent issue of discrimination.

The Commission should not feel satisfied in its accomplishments in achieving cheaper purchased gas costs for Corinth (and presumably the gas consumers of Corinth). The responsibility of regulation is not this narrow. In any given case, efforts ought to be focused on the largest practicable segment of the gas consuming public, rather than the smallest. What most deeply disturbs me about the Opinion today is that it does not squarely face the evident problem of how equivalent, nondiscriminatory treatment is to be achieved for the gas consumers served

by other distributors on the Alabama-Tennessee line. The consumers of gas in Florence and Sheffield can be expected to be informed of what is happening in Corinth. Are they going to be satisfied with the lame excuse by this Commission that they should blame their city councils, rather than the Federal Power Commission, for what to them is going to appear to be rank price discrimination?

It is entirely possible that an even more embarrassing question might soon be presented to the Commission: The *base load* of Florence and Sheffield will not be covered by a contract after 1970 and 1971. Using the Commission's rationale about "savings", these communities could well compute a price advantage, based upon shifting to Tennessee as a full requirements customer at that time, even after honoring their contracts with Alabama-Tennessee by paying to Alabama-Tennessee the minimum bill under its filed

tariff.[4] Using 1966 actual purchases as the basis of comparison, and the 60% clause of the contract, there would still be "savings" in such a shift as compared with the purchased gas costs of staying with Alabama-Tennessee:

	1966 actual purchased gas costs paid to Alabama-Tennessee		Cost under Tennessee's G-1 rate, plus minimum demand paid to Alabama-Tennessee	
	Vol. (Mcf)	*Cost*	*Cost*[a]	*Savings*
Florence	1,459,562	$692,630	$587,202	$105,428
Sheffield	712,972	$336,738	$281,581	$ 55,157

[a] Includes minimum demand bill paid to Alabama-Tennessee of $39,120 for Florence and $15,012 for Sheffield.

[4] See Alabama-Tennessee Natural Gas Company's filed tariff: First revised sheet No. 6 and second revised sheet No. 8 of the first revised Volume 1. The minimum monthly bill equals the demand charge. The demand charge is equal to the higher of: (1) the greatest day's delivery during the 12-month period ending on the day of the billing month, or (2) 60% of the maximum demand obligation in the service agreement.

If such should transpire, the Commission will have to deal with another problem not grappled with in this Opinion—whether Tennessee's G-1 schedule would be denied to these other communities, on the basis that the annual "tribute" involved in paying a supplier for the balance of the contracted period amounted to a split in its load such as to disentitle the use of the cheaper full-requirements rate. The computed minimum demand charge payable to Alabama-Tennessee based on the volumes covered by the incremental agreements would be $39,120 for Florence, and $15,012 for Sheffield. These payments measure the additional cost to the municipalities who signed up with

Alabama-Tennessee as compared to following a course of conduct like Corinth's.

The issue in reality is now before us because Alabama-Tennessee is seeking certificate authority to construct facilities needed to meet Corinth's needs at least until February 1, 1970. Upon whom does the responsibility for getting gas to Corinth presently rest? Obviously Alabama-Tennessee cannot be required to exceed the physical limits of its installed lateral (5300 Mcf per day), nor may it expand this capacity without Commission certification. Equally as obviously, some kind of mutuality must attend the contract between Corinth and Alabama-Tennessee; Alabama-Tennessee having the duty to serve Corinth, it also should have the *right* to serve Corinth. This latter right is honored by disallowing Corinth the full use of its newly authorized lateral connecting with Tennessee until the contract runs out, and furthermore requiring Corinth to pay Alabama-Tennessee for all of its takes, at a rate higher than that charged by the actual supplier.

This raises the question posed at the outset, namely the legal authority to take the action relating to the interim

period. As I stated, the problem has practical limitations which dissuade me from dissenting, but not from discussing.

The needs of Corinth's customers for the next three winters (including the present one), apparently become its own responsibility to the extent these needs exceed the safe capacity of the existing Alabama-Tennessee lateral. Alabama-Tennessee is relieved of this responsibility, and it is not imposed upon Tennessee. The reason, of course, is that it may not be imposed upon Tennessee without a frontal assault on the Commission-approved contract between Corinth and Alabama-Tennessee. Corinth is not ordered to construct the lateral; it is only permitted to construct it. Tennessee is granted authority to connect the new lateral after it is built, but even then it has no authority from the Commission to make a sale to Corinth before 1970 because until that date Corinth's contract with Alabama-Tennessee is binding. This problem is met, presumably, by utilizing the authority of section 7(a) to

order Tennessee to deliver gas to Corinth, not on its own account, but on the account of Alabama-Tennessee. In this case, although the authority is less clearly *sua sponte* than it was in *Algonquin*,[5] its application here, as in that case, moves in the direction of the Commission taking responsibility for feasibility and service planning which the regulatory scheme set forth in the Natural Gas Act imposes on the utility, not the agency.

Both in theory and in practice, this permissive approach to meeting a community's requirements for gas poses problems. Suppose it should be found that some legal barrier prevented Corinth from constructing the line outside

[5] *Algonquin Gas Transmission Co.*, 37 FPC —, Opinion No. 522, issued June 27, 1967.

its municipal boundaries.[6] There is no regulation-ordered assurance that the gas consumers of Corinth will actually receive additional quantities of gas above the present capacity of the Alabama-Tennessee line, and there is no record basis for the interim measures devised by the Commission.

The Commission's concern for the welfare of the consumers is not bounded by the city limits of Corinth; it must look to the other customers of Alabama-Tennessee, and beyond. If other customers, as a result of a series of Corinth-type actions may be saddled with additional fixed costs, it is no answer to say that their problems can be met in later cases—by then it may be too late.

If an expert body can see that other customers will demand equivalent treatment, it is no answer to lean upon

[6] Cf. *American Louisiana Pipe Line Company*, 30 FPC 698, 708, wherein the alternative of service by a franchised distributor rather than by the pipeline was favored by a majority of the city council, although the vote was one short of the number required to sanction the action under local law. In that case, the city was permitted to build a 32-mile lateral, although an interconnection with the distributor would have entailed only a 4-mile lateral.

artificially legalistic reasoning, such as the presence or absence of service agreements. This too is a problem of regulation.

And most important of all, the Commission owes it to other consumers and the regulated companies to set forth the boundaries of the neo-competition involved in a customer shifting to its supplier's supplier.

To consider Tennessee a "competitor" of Alabama-Tennessee is to abuse the word, so long as Alabama-Tennessee is a customer of Tennessee. To call this competition is to open the same semantics the Commission's stated preference for the local distributor over pipelines,

because functionally Alabama-Tennessee is a distributor. It purchases from another pipeline, and has no gas supply of its own. Since its function by definition is that of a middle-man the arguments that economic detriment can't be presumed from losing Corinth as a customer have a particularly hollow ring. Today's Opinion may be a death sentence for Alabama-Tennessee. It and similarly-situated pipelines will scarcely be able to withstand the "competitive" pressures of their own suppliers for the cream of their markets.

I also have reservations about the argument that there are real economies in this shift of supplier, although undeniably Corinth will realize cheaper purchased gas costs.

From the standpoint of regulation, however, the inquiry should go a little deeper. The Commission's recognition that there are offsetting costs, particularly the nonuse or premature abandonment of Alabama-Tennessee's facilities goes only part of the way. Specifically, it utilized as a measure, the unrecovered original cost. By the stress laid upon the fact "that except for possibly $40,000, all of A-T capital investment in the Corinth line will have been recovered by 1970, and the $40,000 can, if necessary, be written off by A-T over a period of years," the Commission confuses the issue. The issue is not whether Alabama-Tennessee or its stockholders have been made whole, or whether by the application of the tax laws or otherwise, the loss can be minimized. The issue is the rational use and allocation of resources.

If the expiration of the Corinth contract did not render the question largely moot, I would urge a better examination of the alternatives, under the teachings of

Scenic Hudson.[7]

One such alternative, perhaps worthy of brief outline, would require a more critical approach to Alabama-Tennessee's rates.

It could be argued that Alabama-Tennessee in strict rate theory has been receiving from Corinth a margin wider than the cost of its service to Corinth. Other customers of Alabama-Tennessee, under the same strict rate theory, have been receiving service at less than its cost.

If Alabama-Tennessee's Commission-approved postage stamp rate has efficacy, as the physical circumstances seem to indicate, then the integrity of that rate ought to be supported by the Commission. This would mean that it should not be used to measure the "savings".

CONCLUSION

In the continuing battle to protect the consumer of natural gas, the Commission has found a target of opportunity in the circumstances of Alabama-Tennessee and Corinth. Although I have joined, I strongly feel that the long-term interests of gas consumers are not being well-served by this ad hoc approach. In concentrating on cheaper gas for one small group of gas consumers right now, we may be consigning a much larger class of similarly situated consumers to discriminatorily harsher treatment over a longer period of time.

The only strategy which appears in the "savings" rationale which possibly could be of benefit to the gas consumers in other towns on the Alabama-Tennessee system

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[7] *Scenic Hudson Preservation Conference, et al* v. *Federal Power Commission, and Consolidated Edison Company of New York, Inc.*, 354 F.2d 608 (2d Cir. 1965), *cert. denied* 384 U.S. 941 (1966).

is that cutting Corinth from the system will serve as a warning to Alabama-Tennessee to "shape up". This may indeed be a salutary consequence; but it hardly represents firm regulation. Pipelines may read the Opinion as a warning to them, not to reduce prices, but to foreclose any further targets of opportunity of the type which was opened to Corinth.

1165

And finally, in the lexicon of regulation the word competition is currently getting a great deal of play. For myself, I do not see that the elimination of a Commission-certificated middleman qualifies as "competition." If it does, we've issued an open invitation to "cream-skimming" market raids which will entail added costs, not savings, in the long run.

JOHN A. CARVER, JR.
John A. Carver, Jr., Commissioner.

1196

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Lee C. White, Chairman; L. J. O'Connor, Jr., Charles R. Ross, Carl E. Bagge, and John A. Carver, Jr.

Docket No. CP66-336

ALABAMA-TENNESSEE NATURAL GAS COMPANY

Docket No. CP67-62

CITY OF CORINTH, MISSISSIPPI v. TENNESSEE GAS PIPELINE COMPANY, A DIVISION OF TENNECO INC.

Order Denying Rehearing, Stay and Reopening of the Record

(Issued January 29, 1968)

On December 29, 1967, both Alabama-Tennessee Natural Gas Company (A-T) and Tennessee Gas Pipeline Company (TGP) filed applications for rehearing of the Commission's order accompanying Opinion No. 534. A-T's application

alleges numerous errors of law and departures from precedent and also that the order rendered would be unfair to it. A-T also asks that the Commission order be stayed and the record be reopened to afford A-T and other parties an opportunity to present evidence on possible rate differentials, including a transportation agreement.

A-T contends that in Opinion 534 the Commission considered that the expiration of the service contract in 1970 rendered it powerless to grant A-T's 7(c) application to continue to serve Corinth. This is on improper interpretation of the Commission's ruling. We were well aware that the practical effect of refusing to grant Corinth's 7(a) application would be to force Corinth to enter into a new service agreement with A-T. Indeed, the Commission could well have required A-T to continue to serve. This was specifically recognized in

our discussion of the early retirement of facilities where it was concluded that while the impact here was insubstantial, "it is possible that in another proceeding this factor could be of such magnitude as to tip the scales against allowing a switch in supplier . . . ." Instead the Commission found that a different arrangement—the granting of Corinth's Section 7(a) application—was more in the public interest.

A-T argues that the Commission erred in allowing Corinth to switch suppliers and that this constituted a modification of its certificate in violation of Section 7(c) which it contends permits no such modification. Citing the *United* case, 31 FPC 1079, affirmed *United Gas Pipe Line Company* v. *F.P.C.*, 385 U.S. 83 (1966), A-T also argues that the Commission's conclusion that Section 7(b) abandonment provisions do not apply is an erroneous hold-

ing which would provide a "one-way street for the benefit of the purchaser."

Contrary to A-T's assertions, the Commission's action in certificating TGP to serve Corinth is not a modification of a certificate within the purview of Section 7(c). The certificate which was issued to Alabama-Tennessee for such service was issued pursuant to an application by A-T to construct facilities and serve Corinth with natural gas under a contract which provided for service until February 1, 1970. We have taken no action which interferes with that service of the certificate which authorizes it. The fact that the Natural Gas Act authorizes the Commission to require A-T to continue to serve after the expiration of its contract is not a requirement that the Commission must do so. *City of Hamilton, Ohio, et al.* v. *F.P.C.*, 37 FPC 209. As to A-T's contention that our action here is contrary to our holding in the United case, we would point out that in that case we had before us two jurisdictional companies and it was within our authority to order United to continue its purchases of natural gas from Continental Oil Company. Clearly, we have no similar authority here to require Corinth to continue to purchase from A-T. In any event, reliance on the *United* case is misplaced for even though the Commission may have authority to allow a customer to continue purchases, that case does not require the Commission to exercise such authority where the Commission deems other action more in the public interest.

1198

A-T claims that the Commission has not taken into account the loss that may occur because the rachet clause in its contract with TGP determines demand charges under a formula whereby for a 12-month period beginning February 1, 1970, A-T would be paying demand charges on the lost Corinth load, based on Corinth volumes for the

12 months beginning February 1, 1969. We do not agree that A-T will, in fact, suffer such detriment due to the loss of the Corinth load. Under the provisions of TGP's Rate Schedule G-1, A-T may avoid the payment of demand charges during the 12 months beginning February 1, 1970, otherwise attributable to the lost Corinth load if, prior to February 1, 1969, A-T notifies TGP that it intends to reduce its purchases as a consequence of the discontinuance of Corinth as a customer. Under these circumstances the rate schedule provides that for the 12 months following February 1, 1970, the basis for the demand charge will be either the greatest number of Mcf delivered by TGP to A-T in any one day from and after February 1, 1970, or the number of Mcf upon which the demand charge would have been computed without the Corinth load, whichever is greater.

In its application for rehearing TGP contends that looping the A-T line would be cheaper than construction of a line by Corinth, would avoid wasteful idling of existing facilities, and would preclude the necessity for construction of another meter station by TGP. It also asserts that Corinth's proposal is less economic to the public in general and could result in a bit-by-bit erosion of A-T's business and the destruction of a regional pipeline supplier which now provides an important and necessary economic service. All of those issues were dealt with by the Commission in Opinion No. 534.

The Commission finds:

The assignments of error and grounds for rehearing and reopening set forth in the applications for rehearing filed herein present no facts or principles of law which were not considered by the Commission when it

issued its Opinion No. 534, or which, having now been considered, warrant any change in, modification of, or rehearing of such Opinion and Order.

The Commission orders:

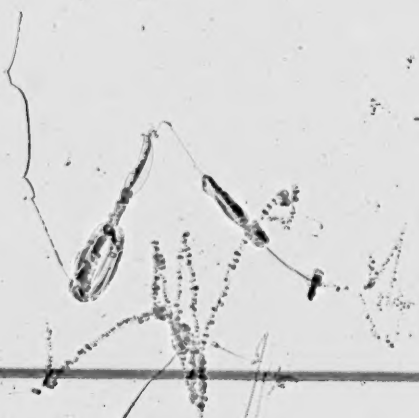
(A) The applications for rehearing are denied.

(B) The application for stay of order and reopening of the the record is denied.

By the Commission. Commissioner Carver adheres to the views set forth in his statement accompanying Opinion No. 534 issued November 30, 1967.

(SEAL)

GORDON M. GRANT,
Secretary.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 987

ALABAMA-TENNESSEE NATURAL GAS COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION, CITY OF CORINTH, MISSISSIPPI, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT, CITY OF CORINTH, MISSISSIPPI, IN OPPOSITION

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INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTE INVOLVED	2
STATEMENT	2
ARGUMENT	6
CONCLUSION	11

AUTHORITIES CITED

CASES:

Alabama-Tennessee Natural Gas Company, 27 FPC 1180 (1962) 7

Alabama-Tennessee Natural Gas Company, 359 F. 2d 318 (CA 5, 1966), cert. denied, 385 U.S. 847 7

Atlantic Seaboard Corp. v. FPC, 397 F. 2d 753 (CA 4, 1968) 9

Cincinnati Gas & Electric Co. v. FPC, 389 F. 2d 272 (CA 6, 1968), cert. denied, 393 U.S. 826 9

Home Gas Co. v. FPC, 231 F. 2d 253 (CADC, 1956), cert. denied, 352 U.S. 831 9

Kentucky Natural Gas Corp. v. FPC, 159 F. 2d 215 (CA 6, 1947) 9

Panhandle Eastern Pipe Line Co. v. FPC, 169 F. 2d 881 (CADC, 1948), cert. denied, 335 U.S. 854 9

United Gas Pipe Line Co. v. FPC, 385 U.S. 83 (1966) .. 10

United States v. Seatrain Lines, Inc., 329 U.S. 424 (1947) 8

STATUTES:

Natural Gas Act, June 21, 1938, c. 556, 52 Stat. 821-33, as amended, 15 USC 717-717w:

Section 7(a) 5

Section 7(b) 10, 11

Section 7(g) 9

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (Pet. App. "A", pp. 1a-10a) is reported at 417 F.2d 511. The opinion and order of the Federal Power Commission (J.A. 103-131) are reported at 38 FPC 1069. The order of the Federal Power Commission denying rehearing (J.A. 132-136) is reported at 39 FPC 97.

JURISDICTION

The judgment of the court below was entered on August 4, 1969 (Pet. App. "B", p. 11a). The court below denied rehearing on September 24, 1969 (Pet. App. "C", p. 12a). The petition for a writ of certiorari was filed on December 22, 1969. The jurisdiction of the court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether the Federal Power Commission acted properly in authorizing a wholesale purchaser of natural gas at termination of its gas purchase contract with its existing supplier to purchase its natural gas requirements from a new supplier at substantially lower cost and without significant detriment to the existing supplier.

STATUTE INVOLVED

The provisions of Section 7 of the Natural Gas Act (15 USC § 717c(b)) are set forth in Appendix D to the petition, pp. 13a to 16a.

STATEMENT

City of Corinth, Mississippi (Corinth), a municipal corporation located in Alcorn County, Mississippi, at a point just south of the Mississippi-Tennessee state line, owns and operates a municipal gas distribution system from which it sells natural gas at retail to consumers located within the corporate limits of Corinth and in an area immediately adjacent thereto (J.A. 2-3). At present, Corinth purchases all of its natural gas requirements from Petitioner under a contract between them which expires February 1, 1970 (J.A. 15, 57-64). Petitioner, in turn, purchases the

natural gas it sells to Corinth from Tennessee Gas Pipeline Company (TGP).

The present contract under which Corinth purchases gas from Petitioner was executed in 1956, and is the last of seven superseding contracts between the parties, all of which have retained an expiration date of February 1, 1970. When the 1956 contract was executed, and repeatedly thereafter, Corinth advised Petitioner that Corinth would not consider an extension of the term of the contract past February 1, 1970, because it intended, at that time, to purchase its requirements directly from TGP (J.A. 4-6).

Although on notice of Corinth's intention to discontinue the purchase of gas from Petitioner on February 1, 1970, Petitioner nevertheless filed, on April 25, 1966, an application with the Federal Power Commission (Commission) for a certificate of public convenience and necessity in which it proposed to construct a new lateral pipeline, paralleling its existing lateral serving Corinth, in order to increase Petitioner's ability to deliver gas to Corinth under maximum daily flow conditions from 5,725 Mcf to approximately 11,500 Mcf (J.A. 77-79, 103-4). Petitioner alleged that the construction of the parallel lateral was necessary to deliver up to 4,700 Mcf per day to Corinth (J.A. 6).

Petitioner's proposal was subject to the condition that Corinth execute a new, superseding contract with Petitioner under which the expiration date of Corinth's obligation to purchase up to 3,850 Mcf per day, the amount stated in the existing contract as the maximum daily delivery, would remain as February 1, 1970, but Corinth's obligation to purchase an additional 850 Mcf per day would extend to November 1, 1985.

Put on notice by Petitioner's conditional certificate application that Petitioner would not deliver in excess of 3,850 Mcf to Corinth[1] and would not undertake construction of facilities to provide up to 4,700 Mcf per day unless Corinth agreed to Petitioner's demands for a new contract with an extension of the term, Corinth took steps to assure an adequate gas supply to its consumers. Corinth filed an application under Section 7(a) of the Natural Gas Act (Act) asking the Commission to direct TGP to connect its facilities with a lateral line to be constructed by Corinth and to sell to Corinth its estimated natural gas requirements in excess of 3,850 Mcf until the expiration of its contract with Petitioner, and at that time to sell to Corinth all of its estimated requirements (J.A. 7-8).

The Commission consolidated for hearing the applications of Corinth and Petitioner. TGP participated in that hearing, taking the position that it would serve Corinth if directed to do so. After hearing, the Presiding Examiner directed TGP to connect its facilities with those of Corinth, and on February 1, 1970, to commence the sale to Corinth of all of its natural gas requirements. The Examiner, however, ruled that until February 1, 1970, Corinth should purchase from Petitioner, and it should supply, all of Corinth's requirements (J.A. 91-97). The Examiner denied Petitioner's application for construction of a lateral paralleling its existing lateral; instead, authorizing Petitioner to loop a segment of the existing lateral which would provide sufficient capacity until February 1, 1970 for the sale and delivery to Corinth of its full requirements (J.A. 96-97, 100-2, 105-6).

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[1] Petitioner disavowed any obligation to deliver in excess of 3,850 Mcf per day to Corinth under the contract, although Petitioner had been delivering up to 5,229 Mcf for which Corinth was billed and paid demand and commodity charges (J.A. 49-50, 105).

In limited exceptions to the Examiner's Decision, Corinth acquiesced in the Examiner's ruling that Corinth should purchase all of its requirements from Petitioner until February 1, 1970. In lieu of the construction of looping facilities by Petitioner that would have only a limited useful life, Corinth proposed immediate construction of its connection with TGP over which TGP would deliver for the account of Petitioner the volumes of natural gas that Petitioner could not safely deliver over its existing lateral.

On November 30, 1967, the Commission issued its Opinion No. 534 and accompanying order (J.A. 103-120). The Commission agreed with the Examiner that TGP should be required to connect its facilities with those of Corinth and on February 1, 1970 to commence the sale of gas to Corinth (J.A. 106). The Commission found that the savings to the consumers from Corinth's purchase of natural gas from TGP would be at least $2,000,000 during the 20-year term of the contract with TGP (J.A. 108). The Commission also found that Petitioner's loss of Corinth's load would be more than overcome by normal growth of Petitioner's sales, and that the impact on Petitioner would be negligible (J.A. 108-110). The Commission concurred in Corinth's proposal for "the immediate construction of the proposed lateral from Corinth to TGP which in any event will be needed for service after 1970", since "economic waste inherent in looping" would be avoided and would permit use of existing facilities "to their maximum safe capacity" (J.A. 116). The Commission directed TGP until February 1, 1970, to deliver to Corinth for the account of Petitioner "the volumes of natural gas which exceed the safe capacity of the existing lateral".

On review, Petitioner challenged only the Commission's authorization to TGP to sell natural gas to

Corinth commencing February 1, 1970. The court below affirmed the Commission's opinion and order, holding that (Pet. App. "A", p. 10a)—

> the Commission's orders are supported by substantial evidence and had a plainly rational basis. Its decision as to where the public interest lay was an exercise of regulatory authority entrusted by Congress to its informed judgment.

ARGUMENT

Contrary to the contentions of Petitioner, the decision of the court below does not conflict with any decision of this Court or with decisions of another circuit court of appeals. The court below properly affirmed the Commission's opinion and order as rationally based and supported by substantial evidence. There are no issues that warrant or necessitate review by this Court.

1. In determining that Corinth should be permitted to obtain gas from a new supplier, the Commission found (J.A. 108) that over the 20-year term of the service agreement with TGP, the savings to the consumer from Corinth's purchase of natural gas from TGP would be a minimum of $2,000,000. These admitted substantial savings in purchased gas costs, which will be passed on to Corinth's consumers (J.A. 41-42),[2]

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[2] Petitioner questions whether any benefits will inure to Corinth's customers because, it says, refunds made by Petitioner in the past were not passed on to Corinth's consumers (Pet. p. 12). What Petitioner fails to point out is that in the past Petitioner imposed rate increases upon Corinth which Petitioner collected from Corinth while the Commission investigated the reasonableness of the rate increases. Corinth, however, did not increase its rates to its consumers. When the refunds were made, Corinth, therefore, used the refunds to make needed extensions and improvements to the gas system, thereby avoiding additional bonded indebtedness, which consumers must underwrite in rates. In fact, Corinth at that time

were properly considered by the Commission as an important, if not a controlling, factor in choosing TGP over Petitioner since, as the court of appeals put it in *Alabama-Tennessee Natural Gas Company* v. *FPC*, 359 F. 2d 318, 331, certiorari denied, 385 U.S. 847, the "primary aim" of the Natural Gas Act "was to protect consumers" and the "central principle in the regulation of the natural gas industry around which all rate making revolves is 'the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption . . . at the lowest possible reasonable rate consistent with the maintenance of adequate service or the public interest.' "

In the court below Petitioner did not contest the sufficiency of the Commission's finding as to the existence or amount of the benefits to Corinth and its customers and that the effect on Petitioner and its remaining customers would be negligible (Pet. App. "A", pp. 8a-9a). Petitioner nevertheless contended, as it continues to contend here (Pet., p. 14), that the Commission failed to give due consideration to the economic effect upon Petitioner and its other customers of the loss of Corinth as a customer. The court below rejected Petitioner's contention (Pet. App. "A", p. 9a). Petitioner has presented absolutely nothing in its petition in support of its rejected contention. There is only the bare, unsupported contention.

2. Equally without merit is Petitioner's bare and unsupported contention (Pet., p. 14) that the Commis-

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expanded service and reduced the bonded indebtedness of the system (J.A. 8). Under these circumstances, no one can fairly say that Corinth's consumers did not realize benefits from the refunds. Indeed they did, and without having their rates increased while Corinth successfully opposed the excessive rate increases before the Commission. *Alabama-Tennessee Natural Gas Company*, FPC Docket No. G-5471, et al., 27 FPC 1180 (1962).

sion failed to give adequate consideration to "reasonable alternatives" proposed by Petitioner under which Petitioner might retain Corinth as a customer while providing Corinth with the benefits it will realize by purchase of gas from TGP. This contention was also urged upon, and was rejected by, the court below (Pet. App. "A", pp. 9a-10a).

As the court of appeals pointed out, on the last day of the hearing, a witness for Petitioner testified that it would not object to the establishment of rate zones on its pipeline system in order to give Corinth a reduction in cost of gas equivalent to that which it would realize by the direct purchase from TGP (Pet. App. "A", p. 10a). No evidence was introduced or sought to be introduced by Petitioner on the subject (Pet. App. "A", p. 10a). Such a change in rate structure, if it could be lawfully made at all (since it smacks of unlawful discrimination), could not be made, the Commission pointed out, without a full-blown rate case with notice and opportunity to intervene to all customers and interested parties not represented in the present case (J.A. 118). This would result in extensive delay which would jeopardize the sufficiency of gas supply to Corinth with no assurance of the outcome of the rate case (J.A. 118; Pet. App. "A", p. 10a). This was no "reasonable alternative", which, the court below agreed, the Commission properly rejected (Pet. App. "A", p. 10a).

3. Petitioner's principal argument (Pet., p. 11) that the Commission's opinion and order revoked Petitioner's certificate of public convenience and necessity and is, therefore, in conflict with this Court's decision in *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424 (1947), is merely wishful thinking. Peti-

tioner conceives of its certificate as granting it an exclusive right to sell gas to Corinth for as long as Petitioner is ready, able, and willing to do so, and that, therefore, the Commission's authorization to TGP revokes rights granted by the certificate. As the court of appeals correctly held (Pet. App. "A", pp. 4a-5a), such a conception of the certificate is defeated by Section 7(g) of the Act,[3] which alone suffices to rebut Petitioner's claim of deprivation of monopolistic and perpetual rights of service. In a consistent line of decisions, as far back as 1947, the courts have rejected claims such as Petitioner advances. *Panhandle Eastern Pipe Line Co.* v. *FPC,* CADC, 1948, 169 F. 2d 881, 883, 884, certiorari denied, 335 U.S. 854; *Kentucky Natural Gas Corp.* v. *FPC,* CA 6, 1947, 159 F. 2d 215, 218; *Home Gas Co.* v. *FPC,* CADC 1956, 231 F. 2d 253, certiorari denied, 352 U.S. 831; *Cincinnati Gas & Electric Co.* v. *FPC,* CA 6, 1968, 389 F. 2d 272, certiorari denied, 393 U.S. 826; *Atlantic Seaboard Corp.* v. *FPC,* CA 4, 1968, 397 F. 2d 753. In these cases, the Commission, with court approval, weighing the benefits and detriments, certificated another supplier to displace existing suppliers in whole or in part. The existing suppliers' certificates in all of these cases were, like Petitioner's certificates, permanent, i.e., without time limit. As the court below succinctly put it (Pet. App., p. 5a):

> The Commission could at the termination of a long-term contract require the distributor to continue dealing with the original supplier by refus-

[3] Section 7(g) provides: "Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural gas company."

ing to certificate a substitute supplier if the only alternative gas supply is from another interstate pipeline. This substitution, however, could in no way convert a certificate authorizing sales to a willing customer into a vested right to continue serving a particular customer indefinitely. A certificate of public convenience and necessity is not a grant of a monopolistic position in a particular area.

4. Of no more substance is Petitioner's argument (Pet., pp. 12-13) that there is a conflict between decisions of this Court and of the District of Columbia Circuit on the one hand and of the court below on the applicability of Section 7(b) of the Natural Gas Act[4], pertaining to abandonment of service by a natural gas company. For conflict with this Court, Petitioner relies on *United Gas Pipeline Company* v. *Federal Power Commission,* 385 U.S. 83 (1966). Petitioner's reliance thereon "is ill-founded" (Pet. App. "A", p. 6a). In that case compliance with Section 7(b) was required because United, a natural gas company subject to the Commission's jurisdiction, proposed to abandon interstate facilities which were constructed and operated under a certificate of public convenience and necessity issued by the Commission to United. This Court ruled that United could not abandon jurisdictional facilities without compliance with

[4] Section 7(b) provides that ". . . No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment."

Section 7(b). In the D.C. Circuit cases, relied on by Petitioner (Pet. App. "A", p. 6a), natural gas companies subject to the Commission's jurisdiction were also proposing to abandon interstate certificated facilities.

In the present case Petitioner, the natural gas company to which Section 7(b) is directed, proposed no abandonment of facilities or service. As for Corinth, neither its facilities nor Corinth are subject to the Commission's jurisdiction. Accordingly, the court below properly agreed (Pet. App. "A", pp. 5a-6a) with the Commission that the claim that "a customer seeking a new source of supply is analogous to an abandonment proceeding is a distortion of the purposes of Section 7(b) which is designed to protect the consumer's right to a continuing source of supply" and "is not designed to bind the customer to any given source of supply."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	5
Argument	8
Conclusion	12

TABLE OF CITATIONS

Cases:

American Trucking Associations, Inc. v. *Frisco Transportation Co.*, 358 U.S. 133	10
Atlantic Seaboard Corp. v. *Federal Power Commission*, 397 F. 2d 753	9, 10
Cincinnati Gas & Electric Co. v. *Federal Power Commission*, 389 F. 2d 272, certiorari denied, 393 U.S. 826	9
Home Gas Co. v. *Federal Power Commission*, 231 F. 2d 253, certiorari denied, 352 U.S. 831	9
Kentucky Natural Gas Corp. v. *Federal Power Commission*, 159 F. 2d 215	9
Michigan Consolidated Gas Co. v. *Federal Power Commission*, 283 F. 2d 204, certiorari denied *sub nom. Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.*, 364 U.S. 913	12
Panhandle Eastern Pipe Line Co. v. *Federal Power Commission*, 169 F. 2d 881, certiorari denied, 335 U.S. 854	9

374-559—70

Cases—Continued Page

Pittsburgh City of, v. *Federal Power Commission*, 237 F. 2d 741 12

Sun Oil Co. v. *Federal Power Commission*, 364 U.S. 170 10

United Gas Pipe Line Co. v. *Federal Power Commission*, 385 U.S. 83 ..... 10, 11

United States v. *El Paso Natural Gas Co.*, 376 U.S. 651 10

United States v. *Seatrain Lines, Inc.*, 329 U.S. 424 10

Statute:

Natural Gas Act, 52 Stat. 821–833, as amended, 15 U.S.C. 717–717w:

Section 7(a), 15 U.S.C. 717f(a) 2, 6

Section 7(b), 15 U.S.C. 717f(b) 3

Section 7(c), 15 U.S.C. 717f(c) 3

Section 7(e), 15 U.S.C. 717f(e) 4, 7

Section 7(g), 15 U.S.C. 717f(g) 5, 7, 9

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[1] The pagination in the supplemental appendix is the same as in the Joint Appendix (herein "J.A.") filed in the court of appeals.

JURISDICTION

The judgment of the court of appeals (Pet. App. 11a) affirming the Commission's order was entered on August 4, 1969. A petition for rehearing *en banc* was denied on September 24, 1969 (Pet. App. 12a), and the present petition was filed on December 22, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, as amended (15 U.S.C. 717r(b)).

QUESTIONS PRESENTED

1. Whether the Commission properly authorized the substitution of a new interstate natural gas supplier for the City of Corinth, Mississippi, which was being served by another interstate pipeline company, after finding that Corinth consumers would be substantially benefited by the change and that the impact on the existing supplier and its other customers would not be significant.

2. Whether the Commission properly refused to require a municipal system to contract for gas with petitioner against the will of the city government and contrary to the best interests of the consumers.

3. Whether a certificate of public convenience and necessity under the Natural Gas Act entitles a pipeline company to continuing freedom from competition for existing and future service.

STATUTE INVOLVED

Section 7 of the Natural Gas Act (15 U.S.C. 717f) provides in relevant part:

> (a) Whenever the Commission, after notice and opportunity for hearing, finds such action

necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion

of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations * * *.

* * * * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

* * * * *

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

STATEMENT

Petitioner, an interstate natural gas pipeline company, sells gas to the City of Corinth, Mississippi, which resells it through its local distribution system (Pet. App. 2a; J.A. 62). For some years petitioner has been supplying greater quantities than called for in its existing contract with Corinth, which expires on February 1, 1970 (Pet. App. 2a; J.A. 77–80). Corinth has refused to execute new agreements either enlarging the quantities in the contract or extending the expiration date of the present contract (Pet. App. 2a; J.A. 79, 91). Petitioner now receives its entire gas supply from Tennessee Gas Pipeline Company at a point a short distance from Corinth, and carries it 3 miles through its system and then to Corinth through a 2.5-mile, 3.5-inch lateral pipeline, which is no longer adequate to meet the increased requirements of Corinth (Pet. App. 2a; J.A. 47).

The present proceedings were commenced when petitioner applied to the Commission for a certificate of public convenience and necessity authorizing construction of another 2.5-mile, 3.5-inch pipeline, paralleling the one already serving the city, on condition that Corinth be required to contract to purchase increased quantities of natural gas from it for an extended period (Pet. App. 2a–3a). The cost of the proposed facilities

was estimated at approximately $42,000 (Pet. App. 3a). Corinth opposed the application and requested the Commission, under Section 7(a) of the Act, to order Tennessee Gas to sell the city the amount of gas it needed in excess of 3,850 Mcf per day (the quantity specified in its contract with petitioner) until February 1, 1970, and its total requirements of 6,550 Mcf per day thereafter (Pet. App. 3a). Corinth proposed to build 2.75 miles of 8⅝-inch pipeline to permit the necessary connection to its facilities (Pet. App. Supp. 105).[2] The cost to the city of the construction was estimated at about $100,000 and the saving in gas costs from the purchase of its full requirements from Tennessee Gas was estimated at about $100,000 annually (Pet. App. 3a).

On motion of petitioner the applications were consolidated (Pet. App. 3a). After hearings and briefing, the examiner in substance granted Corinth's application over the objections of petitioner and Tennessee Gas (J.A. 77–102). The Commission, with some modifications, concurred in that determination, denying petitioner's application and granting Corinth's (Pet. App. 3a; Pet. App. Supp. 119–120).[3] It found that

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[2] In 1951, when Corinth built its distribution system, petitioner's line was the nearest pipeline to it and Corinth had agreed to purchase gas from it under a long-term contract expiring February 1, 1970. At that time Tennessee Gas' nearest line was about 20 miles from Corinth. A few years later Tennessee Gas, from which petitioner buys its gas, built its Kinder-Portland line which passes about one mile from Corinth (J.A. 3–5, 9–10, 78).

[3] The Commission ordered Tennessee Gas, until February 1, 1970, to deliver to Corinth, for the account of petitioner, Corinth's requirement in excess of 5,300 Mcf per day (Pet. App. Supp. 119–120). That is the amount being supplied currently by petitioner to the city.

purchasing from Tennessee Gas would save Corinth $2,000,000 over a 20-year period and also that the detriment to petitioner and its other customers would not be serious. In this respect, it found specifically that the loss of sales to Corinth would be more than compensated for by normal growth in petitioner's sales to others.[4] In addition, the Commission found that the unamortized cost of petitioner's facilities serving Corinth would be about $40,000 by February 1, 1970, with 60 percent of that amount representing the meter stations that would still have salvage value, and that the balance would be amortizable over several years (Pet. App. Supp. 109–111; Pet. App. 3a–4a).

The court of appeals affirmed the Commission's decision. It agreed with the Commission that the replacement of petitioner by Tennessee Gas as Corinth's supplier constituted neither a revocation of petitioner's certificate nor an abrogation of petitioner's contract with Tennessee Gas for increased purchases. It pointed out that the certificate issued to petitioner had never insured that Corinth would continue to purchase gas from petitioner beyond the contract term or that petitioner would be protected from competition from other interstate pipelines. The court, as had the Commission, explained that Section 7(g) authorizes the grant of more than one certificate for one service area and that Section 7(e) directs

[4] Petitioner had estimated its 1970 volume, without sales to Corinth, at 15,204,400 Mcf as against an estimated 1966 volume, with sales to Corinth, of 12,914,200 Mcf. The 1970 peak-day wholesale sales without Corinth were estimated at 90,210, compared to an estimated peak of 89,710 in 1966, including Corinth (Pet. App. Supp. 108–109).

the grant to a qualified applicant. The Act's primary criterion for certification is the public interest which, the court concluded, the Commission had reasonably found would be served by substitution of the new supplier (Pet. App. 4a–5a, 7a–8a). The court below also found (Pet. App. 5a–7a) that the Commission's action was not inconsistent with the abandonment provisions of Section 7(b) of the Act. Finally, it concluded that the Commission had reasonably found that it was in the public interest to permit Corinth to reduce its gas costs substantially where there was no serious detriment to petitioner and its other customers (Pet. App. 8a–9a).

ARGUMENT

As the court below properly held, petitioner's claim that the Commission's action constitutes a revocation of its certificate rests on the frequently rejected view that natural gas pipeline certificates assure freedom from competition. Moreover, the alleged conflicts with other decisions are non-existent. Accordingly, no further review is warranted.

1. The Commission found that the public interest would be served by permitting the City of Corinth, which distributes natural gas locally, to buy its gas directly from Tennessee Gas rather than from petitioner (which buys from Tennessee Gas) starting in February 1970, when Corinth's long-term contract to purchase gas from petitioner expires. Petitioner, in making its basic challenge that this action of approving a substitute supplier violates its existing certificate, refuses to accept the well-established

principle that certificates of public convenience and necessity under the Natural Gas Act do not grant the holder an exclusive or perpetual right to provide a certificated service.

To the contrary, as the court below stated (Pet. App. 4a–5a), Section 7(g) of the Act unqualifiedly provides that "[n]othing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company." The courts have accordingly long recognized that this language contemplates competition for both existing and new markets, and permits the full or partial replacement of an existing supplier where the public interest is served by such a substitution. See, *e.g.*, *Cincinnati Gas & Electric Co.* v. *Federal Power Commission,* 389 F. 2d 272 (C.A. 6), certiorari denied, 393 U.S. 826; *Atlantic Seaboard Corp.* v. *Federal Power Commission,* 397 F. 2d 753 (C.A. 4); *Kentucky Natural Gas Corp.* v. *Federal Power Commission,* 159 F. 2d 215 (C.A. 6); see also *Home Gas Co.* v. *Federal Power Commission,* 231 F. 2d 253 (C.A. D.C.), certiorari denied, 352 U.S. 831; *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission,* 169 F. 2d 881 (C.A.D.C.), certiorari denied, 335 U.S. 854. As the Fourth Circuit held in the *Atlantic Seaboard* case, rejecting the contention that a certificated supplier was entitled to continue service at its historic level even where no contractual obligation existed, the "Natural Gas Act does not expressly limit a second supplier to incremental sales,

and neither the commission nor the courts have imposed such a rigid exclusion. The Act's primary criterion for certification is the public interest" (397 F. 2d at 758–759).[5]

Thus, the Commission and the court below were plainly correct in rejecting petitioner's restrictive statutory construction which would reduce the Commission's ability to perform its statutory function in eliminating excess charges to some consumers resulting from a middleman that has become unnecessary, where the harm to other consumers, if any, was reasonably found to be minimal.

2. Petitioner's claim of a conflict with *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424, and *American Trucking Associations, Inc.* v. *Frisco Transportation Co.*, 358 U.S. 133, is premised on the erroneous view that its certificate was revoked by not treating it as a perpetual grant to serve the City of Corinth free of competition from other natural gas pipelines.

The allegations of conflict with *Sun Oil Co.* v. *Federal Power Commission*, 364 U.S. 170, and *United Gas Pipe Line Co.* v. *Federal Power Commission*, 385 U.S. 83, are equally insubstantial. In *Sun Oil* the Court approved the Commission's view that the certificate there issued did not terminate by its own terms at the expiration of the underlying gas sales contract and that consequently the new rate under a substitute contract was properly viewed by the Commission as a

[5] There the Fourth Circuit properly rejected the claim, repeated here (Pet. 15), that this Court's dictum in *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 660, meant that competition could, as a matter of law, be only for new service.

rate change, subject to suspension, rather than as an initial rate not subject to suspension. But the fact that a seller of natural gas may not use the expiration of its contract as a basis for stopping an existing service unless a higher price is permitted to become effective without suspension provides no support for the present claim that the Commission, after examining all aspects of the public convenience and necessity, may not permit a substitution of supplier after termination of the contract period.

Reliance on *United Gas* is also misplaced. There the Court, in upholding the Commission's action, decided that a natural gas pipeline company could not cease purchasing gas without Commission authorization, where such a cessation involved the unilateral abandonment of some of its jurisdictional facilities and services. But, as this Court made clear (385 U.S. at 91), the purchaser could abandon its jurisdictional facilities and thus its supplier's service if the Commission gave consent after it had been given an opportunity to consider all pertinent public interest factors. The present case, though not involving an abandonment as petitioner claims, nevertheless did involve a full consideration of all pertinent public interest factors. Thus, the Commission not only took into account the substantially lower gas purchase costs for Corinth, but also found that the adverse effect of the substitution of another supplier on petitioner and its remaining customers would be negligible. The court below (Pet. App. 8a–10a) found this conclusion rationally based and supported by substantial evidence. These factual findings are not challenged here. Petitioner's

assertion (Pet. 13–14) that the Commission considered only the effect of the substitution on Corinth is thus incorrect.[6]

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] For similar reasons, the alleged conflicts with *Michigan Consolidated Gas Co.* v. *Federal Power Commission*, 283 F. 2d 204 (C.A.D.C.), certiorari denied *sub nom. Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.*, 364 U.S. 913, and *City of Pittsburgh* v. *Federal Power Commission*, 237 F. 2d 741 (C.A.D.C.), are also non-existent.

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